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HARVARD LAW REVIEW

ARTICLE

ETHICAL DISCRETION IN LAWYERING

William H. Simon*

In this Article, Professor Simon argues that conventional approaches to legal ethics are too categorical. Rather than operating within a system of formalized ethical rules, he argues, lawyers should exercise judgment and discretion in deciding what clients to represent and how to represent them. In exercising this discretion, lawyers should seek to "do justice." They should consider the merits of the client's claims and goals relative to those of opposing parties and other potential clients. They should also consider the substantive merits of the client's claims and the reliability of the standard legal procedures for resolving the problem at hand. Professor Simon also defends his argument against a variety of possible objections that supporters of conventional approaches to legal ethics might make.

LAWYERS should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims. This discretion involves not a personal privilege of arbitrary decision, but a professional duty of reflective judgment. One dimension of this judgment is an assessment of the relative merits of the client's goals and claims and those of other people who might benefit from the lawyer's services. Another is an attempt to reconcile the conflicting considerations that bear on the internal merits of the client's goals and claims. In both dimensions, the basic consideration should be whether assisting the client would further justice.

This Article argues that lawyers should have such discretion. The argument differs from more prevalent approaches to legal ethics in rejecting the premise that the legal permissibility or enforceability of a client's course of action or claim is an ethically sufficient reason for assisting the client. It also differs from many critiques of prevalent legal ethics doctrine that appeal to moral concerns outside the legal

* Professor of Law, Stanford University. I am grateful to many colleagues for valuable assistance. Bob Gordon, Andy Kaufman, Karl Klare, David Luban, Deborah Rhode, Robert Rosen, David Wilkins and participants in faculty seminars at Columbia University, the University of Maryland, and the University of Pennsylvania were especially helpful.

system against values associated with the legal role.¹ The argument here is that ethical discretion would best vindicate our legal ideals and contribute to a more effective functioning of the lawyer role.

The argument focuses on the issues of legal ethics that are usually understood as arising from conflicts between the interests of the client and those of third parties and the public, although it suggests that these conflicts are better understood in terms of competing legal ideals. The analysis considers only civil practice. Although it has relevance to criminal practice, defending its application there would require qualifications and elaborations that would take it too far afield.

Throughout most of the discussion I do not distinguish between ethical analysis relevant to a regulatory body promulgating rules of professional conduct and analysis relevant to an individual lawyer operating within the limits of promulgated rules. The argument is designed for both contexts. It has implications for how disciplinary rules should be framed. Because such rules are likely to leave a good deal of autonomy to individual lawyers, however, the argument also suggests how decisions should be made within the range of that autonomy.

Part I sketches some premises of contemporary discussions of legal ethics. Part II describes the contrasting premises of what I call the discretionary approach. Part III then responds to objections to the discretionary approach that might be raised from the perspective of the prevailing doctrine.

I. CONVENTIONAL DISCOURSE: TWO MODELS

Consider two crude models designed to evoke some familiar tendencies of lawyers' discussions of ethical decisionmaking. The first model emphasizes the lawyer's role as advocate and her duty of loyalty to the client; the second emphasizes the lawyer's role as officer of the court and her duty of loyalty to the public.²

¹ See, e.g., A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 90-155 (1980); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). I now think that I was mistaken to argue in an earlier article that the critique of conventional advocacy presented there required abandoning the lawyer's professional role. See Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29. With that major qualification, however, the ethical approach defended in this Article is an elaboration of what I previously called "non-professional advocacy." See *id.* at 130-44.

² For a critical exposition of the jurisprudential foundations of the models under the rubrics of "positivism" and "purposivism" respectively, see Simon, cited above in note 1, at 39-91; see also Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1026-45 (1982) (contrasting "market" and "public utility" models of legal reform).

The reader who is impatient with models, "ideal types," and heuristic simplifications of this sort might well skip this Part. My main purpose in this Article is not to criticize directly the

The first might be called the libertarian approach. Its basic maxim is that the lawyer is obliged — or at least authorized — to pursue any goal of the client through any arguably legal course of action and to assert any nonfrivolous legal claim. In this approach, the only ethical duty distinctive to the lawyer's role is loyalty to the client. Legal ethics impose no direct responsibilities to third parties or the public other than those the system imposes on citizens generally.

The libertarian approach privileges procedure over substance. It legitimates conduct that is authorized by procedural rules but undercuts substantive rules — for example, pleading the statute of frauds to defeat the enforcement of a contract or invoking litigation rules that create delay and expense in order to encumber the enforcement of a substantively valid claim. The libertarian approach also privileges form over purpose by authorizing appeals to interpretations of rules that frustrate the purposes of the rules. For example, it legitimates tax avoidance devices that, while arguably permitted by the language of the statutes, are contrary to the legislative intent. And it permits a party to a contract to take advantage of the contractual language in ways that thwart the expectations of the other party.

The libertarian approach also privileges narrow ways of framing ethical issues over broad ones. It tends to construe legal norms to regulate minimally, permitting nonlegal advantages and disadvantages to exercise a relatively broad influence over the resolution of legal controversies. As long as an advantage or disadvantage cannot be traced to specific unlawful conduct on the part of the lawyer or client, the libertarian approach imposes no duty to compensate for it. Thus, the lawyer for a corporate defendant is free to take advantage of the greater risk-aversion of an individual plaintiff in negotiating a settlement. Lawyers for relatively wealthy clients may invoke procedures in order to impose prohibitive expense on relatively poor ones, and publicly subsidized lawyers for poor clients may engage in tactics that impose expenses on opposing parties required to pay for their counsel.

The second model can be called the regulatory approach.³ Its basic maxim is that the lawyer should facilitate informed resolution

prevailing approaches, but to describe and defend an alternative approach. I offer these admittedly crude models to sharpen the comparison and to suggest the genesis of my alternative.

On the other hand, if the reader's complaint is that my proposal, although plausible, is not as radically different from one of the prevailing approaches as I portray it, I plead no contest. I think most people do find the discretionary approach different, but it is not important to my argument to establish that it is.

³ The terms "libertarian" and "regulatory" are unsatisfactory to the extent that they encourage the jurisprudential mistake of conflating the "regulatory" approach with socialism. For an example of this mistake, see D'Amato & Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U.L.J. 761, 770-72 (1983). In fact, the regulatory approach has no necessary connection to any particular type of economic system. The most distinctive feature of the regulatory approach is fidelity to substantive legal norms. In a capitalist society, these norms would be capitalist. It

of the substantive issues by the responsible officials. The regulatory model privileges substance over procedure. It sees the lawyer's basic function as contributing to the enforcement of the substantive law, and it inclines toward forbidding her to use procedural rules in ways that frustrate the enforcement of substantive norms. The most important way it does so is by giving the lawyer strong responsibilities as a distiller and transmitter of information. Her basic duty is to clarify the issues in ways that contribute to a decision on the merits, not to manipulate information to serve the client's goals. The job still involves advising the client on ways to advance her interests and presenting the client's case, but it also involves a duty to develop and disclose adverse information that would be important to the responsible official. The duty applies in negotiation as well on the theory that disclosure is likely to move settlements closer to the resolution that the responsible officials would have imposed.

The regulatory approach tends to privilege purpose over form. It understands the enforcement task in terms of the purposes expressed in the articulated law. And it tends to privilege broad ways of framing issues over narrow ones. It refuses to exempt the lawyer from responsibility for circumstances that impede enforcement merely because her conduct has not affirmatively contributed to them. In particular, it imposes affirmative duties to share information and to correct misunderstanding.

Despite their opposed perspectives, the libertarian and regulatory models share a common style of reasoning. The style might be called categorical, by which I mean simply the practice of restrictively specifying the factors that a decisionmaker may consider when she confronts a particular problem. In the categorical style, a rigid rule dictates a particular response in the presence of a small number of factors. The decisionmaker has no discretion to consider factors she encounters that are not specified or to evaluate specified factors in any way other than that given in the rule.

The libertarian and the regulatory approaches are categorical in two important respects. First, under both approaches, the lawyer has little or no discretion to consider whether there might be legal reasons why a particular course of action should not be pursued or a particular claim not enforced, even though the course is legally permissible or the claim potentially enforceable. Under the libertarian approach, the lawyer can consider only whether the course or claim is arguably permissible or enforceable. The regulatory approach has a more demanding standard; it rejects some justifications that would satisfy

has even been argued that a capitalist system requires something like a regulatory approach to lawyering. See Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. (forthcoming 1988); see also *infra* pp. 1134-35 (discussing American precedents for the regulatory approach).

libertarians — those relying on applications of procedural norms that thwart substantive ones or on appeals to form that frustrate purpose. Yet even the more ambitious formulations of the regulatory approach preclude consideration of many factors that bear on the legal appropriateness of assisting with the claim or action, including notably those discussed below under the rubric “relative merit.”

Second, the dominant approaches are categorical in that they respond to the recurring tensions of legal ethics — substance versus procedure, purpose versus form, and broad versus narrow framing — by privileging some elements over others. The libertarian approach privileges procedure, form, and narrow framing; the regulatory approach privileges substance, purpose, and broad framing. This privileging need not amount to a dogmatic refusal to acknowledge the competing elements. Rather, it can take the form of insisting on strong presumptions designed to restrict judgment in ways that often preclude lawyers from taking the actions that seem most legally appropriate in particular circumstances.

Hardly anyone subscribes to the libertarian or the regulatory approaches in the unqualified form that I have described. Yet the tendencies these models represent are influential. They function, often tacitly, as basic starting points. For example, the libertarian approach figures importantly in the norms of “represent[ing] a client zealously within the bounds of the law” of the *Model Code of Professional Responsibility*.⁴ The regulatory approach resembles Marvin Frankel’s proposals for truth-focused advocacy.⁵

To be sure, the *Code* adds qualifications to the “arguably legal” maxim, such as the prohibition of explicit misrepresentation even when not independently unlawful and the duty to disclose adverse legal authority to the court.⁶ At the same time, Frankel’s truth-focused advocacy is qualified by a duty of confidentiality.⁷ And many people have tried to combine the two approaches by suggesting, for example, that the libertarian approach is suitable for contested litigation, whereas the regulatory approach is appropriate for negotiation

⁴ MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) [hereinafter MODEL CODE]; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 comment (1983) [hereinafter MODEL RULES] (“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause The law, both procedural and substantive, establishes the limits within which an advocate may proceed.”). For examples of the libertarian approach to legal ethics, see M. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975), and Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

⁵ See Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

⁶ See MODEL CODE, *supra* note 4, DR 7-102(A)(5) (misrepresentation); *id.* DR 7-106(B)(1) (adverse legal authority).

⁷ See Frankel, *supra* note 5, at 1057–58 (proposing a disclosure rule with an exception for matters subject to evidentiary privilege).

or ex parte proceedings.⁸ Moreover, many of the norms of the *Code* and perhaps most of those of the *Model Rules* are not categorical. Indeed, some of these norms take a form that seems virtually the opposite of categorical. These norms, which might be called private, contemplate decisions exempt from review and discipline in accordance with unspecified and perhaps (although this is ambiguous) extralegal standards.⁹ Some of the advocacy norms responsive to the interests of third parties, such as the rule that the lawyer "may" make disclosures necessary to prevent her client from causing serious physical harm, take the form of private norms.¹⁰

Still, crude as they are, the two models are useful heuristics. They evoke general background ideals that animate discussion of more concrete issues. As practical precepts, their basic maxims function as strong presumptions. The qualifications are important, but they are just that — qualifications to a governing principle. In the absence of a specifically applicable rule, discussion tends to resort to one or the other of the basic maxims.

Moreover, despite the many noncategorical rules in the *Code* and the *Model Rules*, there remains a tendency to treat the issues considered in this essay — those seen in terms of conflicts between the interests of clients and those of third parties and the public — in categorical terms. The norms that bear most importantly on these issues do tend to be relatively categorical.¹¹ These include the *Code's* requirement that the lawyer pursue "lawful [i.e. arguably legal] objectives of his client through reasonably available means permitted by law" subject only to a few narrowly defined exceptions,¹² and the confidentiality norms of both the *Code* and the *Model Rules* that prohibit disclosure of adverse information subject only to narrowly specified exceptions.¹³ This categorical tendency is also reflected in

⁸ Cf. Rubin, *A Causeur on Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975) (arguing for a regulatory approach in negotiation); MODEL RULES, *supra* note 4, Rule 3.3(d) (prescribing a duty in ex parte proceedings to "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision").

⁹ See MODEL RULES, *supra* note 4, Scope, para. 1 (stating that "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion [afforded by private norms]").

¹⁰ See *id.* Rule 1.6(b)(1); see also *id.* Rule 1.13(c) (stating that the lawyer for an organization "may" resign if the organization's officers insist upon a course of action that is clearly illegal and harmful to the organization). Another example of a private norm is the rule stating that a lawyer "may refuse to offer evidence that the lawyer reasonably believes is false." *Id.* Rule 3.3(c).

¹¹ Cf. Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30 CLEV. ST. L. REV. 571, 574 (1982) (praising the *Model Rules* for "provid[ing] a black letter rule . . . of the lawyer's legal obligations").

¹² MODEL CODE, *supra* note 4, DR 7-101(A)(i); see also *id.* EC 7-4 (allowing a lawyer to "urge any permissible construction of the law favorable to his client").

¹³ See *id.* DR 4-101; MODEL RULES, *supra* note 4, Rules 1.6, 3.3.

some of the norms designed to protect third parties or the public, such as the prohibition of lawyer misrepresentation¹⁴ and the duty to disclose adverse legal authority in certain circumstances.¹⁵ The private norms that bear on matters of advocacy are clearly subordinate to categorical ones. The boundaries of decision are defined by related categorical norms, and analysis focuses on the boundaries. The private norms seem to have relatively little content of their own.¹⁶

When lawyers put aside the parsing of the rules and engage in more open-ended discussion of the issues of advocacy, they tend to assume that issues should be resolved in terms of categorical judgment, even when they differ over the correct resolution of specific issues. For example, consider an exchange between Monroe Freedman and Geoffrey Hazard over whether a lawyer representing the husband in a divorce case must disclose income that the husband has concealed from the wife. As Freedman tells the story, the "wife is represented by a so-called 'bomber' who has no value in life other than stripping the husband of every penny and piece of property that he has, at whatever cost to the personal relations and children, or anything else."¹⁷ Hazard points out that he could retell the story with the wife and children out in the rain and snow while the husband luxuriates in the Caribbean. Hazard expresses the common premise of the categorical approaches when he concludes that "you can't have it both ways. . . . You can't make these cases turn on the underlying merits. We are talking about, in the fundamental sense, the procedural rule."¹⁸ Freedman would be the last to disagree about the need for a rigid rule, but for him the appropriate rule is "don't disclose" rather than, as for Hazard, "disclose."¹⁹ By contrast, the central

¹⁴ See MODEL CODE, *supra* note 4, DR 1-102(A)(4), 7-102(A)(5); MODEL RULES, *supra* note 4, Rule 4.1.

¹⁵ See MODEL CODE, *supra* note 4, DR 7-106(B)(1); MODEL RULES, *supra* note 4, Rule 3.3(a)(3).

¹⁶ See A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 817-21 (2d ed. 1984) (discussing the problems of ambiguity and standardlessness in the Code's private norms).

When the drafters of the *Model Rules* purport to accommodate "difficult issues of professional discretion [that] must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules," MODEL RULES, *supra* note 4, Preamble: *A Lawyer's Responsibilities*, para. 8, I think they are correct with respect to issues of advocacy only to the extent they refer to what I call private norms rather than discretionary norms as I define them below. There are some discretionary norms in the *Model Rules*, but most of them concern matters other than advocacy. See, e.g., *id.* Rule 1.5(a) (prescribing that "[a] lawyer's fee shall be reasonable" and giving a nonexclusive list of factors to be considered in assessing reasonableness).

¹⁷ *A Gathering of Legal Scholars to Discuss "Professional Responsibility and The Model Rules of Professional Conduct,"* 35 U. MIAMI L. REV. 639, 652-53 (1981) [hereinafter *Gathering*].

¹⁸ *Id.* at 654.

¹⁹ See *id.* at 652-53, 654. In the case discussed by Freedman and Hazard, the concealment involved client perjury, and Hazard's rule apparently would apply only to cases in which this factor is present.

thrust of the approach defended in this essay is to insist that the decision should often turn on "the underlying merits."

II. THE DISCRETIONARY APPROACH

The basic maxim of the approach I propose is this: The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice. This "seek justice" maxim suggests a kind of noncategorical judgment that might be called pragmatist, ad hoc, or dialectical, but that I will call discretionary.²⁰ "Discretionary" is not an entirely satisfactory term; I do not mean to invoke its connotations of arbitrariness or nonaccountability, but rather its connotations of flexibility and complexity. Unlike the private norms of the *Code* and *Model Rules*, discretionary norms, as I define them, do not connote standardlessness and nonreviewability. I use the term in what Ronald Dworkin calls "a weak sense" to indicate that the relevant norms "cannot be applied mechanically but demand the use of judgment."²¹

In the context of professional responsibility, lawyers tend to be skeptical that judgments applying abstract ideals to particular cases could be anything but arbitrary. Yet lawyers also tend to regard discretionary judgment as plausible in the context of the judicial role. The kind of complex, flexible judgment proposed here has been extensively defended against more categorical styles in some of the best-known literature of judicial decisionmaking.²² Although this portrayal has been challenged, it has gained wide acceptance, even among

²⁰ The following excerpt from a leading trial practice text illustrates the discretionary "seek justice" maxim. Although exceptional among mainstream legal ethics writings in its explicitly noncategorical stance, it suggests that the approach advocated here is not entirely alien to practice.

Consider the use of surprise tactics The Code of Professional Responsibility does not refer to the use in general of surprise tactics, but clearly the use of such tactics to defeat an admittedly just claim or defense is not supportable. On the other hand, the use of surprise to expose falsification is clearly justifiable. . . . It is in some such "intermediate" form that the problem of professional responsibility usually arises. . . . Probably the answer implicit in prevailing practice is that it is permissible to use any legally supportable ground of claim or defense; though it is a surprise move, to uphold a position you believe just, whatever the basis of your belief may be.

R. KEETON, TRIAL TACTICS AND METHODS 4-5 (1973); see also White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927-28 (1980) (arguing that categorical norms forbidding lying during negotiations are ethically implausible and inconsistent with prevalent practices).

²¹ R. DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977). Alan Goldman's account of legal ethics, cited above in note 1, and David Luban's *Lawyers and Justice* (forthcoming 1988) emphasize discretionary judgment in the sense that I use the term.

²² See, e.g., B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); R. DWORKIN, *supra* note 21; H. HART & A. SACKS, THE LEGAL PROCESS (tent. ed. 1958).

lawyers hostile to this style of decision in legal ethics.²³ The preference for categorical reasoning in the lawyering context reflects nothing more than a failure to carry through to the lawyering role the critique of formalism, mechanical jurisprudence, and categorical reasoning that has been applied to the judicial role throughout this century.

Another pertinent context in which lawyers have been relatively willing to accept the possibility of meaningful discretionary judgment is that of the public prosecutor.²⁴ Indeed, my formulation of the basic maxim of the discretionary approach has been partly inspired by the maxim the *Code* prescribes for the prosecutor: "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."²⁵

To propose a style of ethical judgment for private lawyers analogous to that familiarly associated with judges or prosecutors is not to say that lawyers should act as if they were judges or prosecutors. The analogy is to the style of judgment, not necessarily to the particular decisions that judges and prosecutors make. The discretionary approach incorporates much of the traditional lawyer role, including the notion that lawyers can serve justice through zealous pursuit of clients' goals. Although it assumes a public dimension to the lawyer's role as well, that dimension is grounded in the lawyer's age-old claim to be an "officer of the court" and in notions about the most effective integration of the lawyering role with other roles in the legal system.

There are two dimensions to the judgment that the discretionary approach requires of the lawyer. The first is an assessment of the relative merits of the client's goals and claims and the goals and claims of others whom the lawyer might serve. The second is an effort to confront and resolve the competing factors that bear on the internal merits of the client's goals and claims.

²³ Lon Fuller, one of the preeminent advocates of the discretionary style in the judicial sphere, helped draft the categorical lawyering norms of the *Code*. For criticisms of his arguments in defense of the *Code*, see Part III, section I below.

²⁴ The ideal of prosecutorial discretion as informal judgment that considers how complex, often vaguely formulated public norms should apply in particular circumstances is defended in M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 80-85 (1973), and in K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 348-56 (1987). For a descriptive account that sympathetically portrays such judgment in practice, see Kaplan, *The Prosecutorial Discretion — A Comment*, 60 NW. U.L. REV. 174, 174-93 (1965). The ideal is not, however, universally accepted. See, e.g., K. DAVIS, *DISCRETIONARY JUSTICE* 188-214 (1969) (favoring substantial categorical formalization of prosecutorial decisionmaking).

Of course, accepting the discretionary ideal of prosecutorial decisionmaking is not necessarily inconsistent with supporting more institutional checks on such decisionmaking. See Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562-72 (1981).

²⁵ MODEL CODE, *supra* note 4, EC 7-13; accord ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.1(c) (2d ed. 1980).

A. Relative Merit

Neither of the dominant approaches adequately confronts a central fact about the legal system: most people are unable to enforce most of their rights most of the time. An important reason is that enforcement requires resources, and the most important resource is professional assistance. The problem is not simply the bar's failure to live up to its professed commitment to provide assistance to those who cannot afford it. At any plausible level of expanded pro bono activity, the problem would remain, because hardly anyone in the society would want to devote the resources needed to bring us even close to a state in which rights could be generally enforced. Thus, legal services are necessarily a scarce resource.

The legal system cannot be indifferent to the distribution of this resource. First, our legal ideals presume a high degree of continuity between the prescriptions of legal norms and the conduct of citizens and officials.²⁶ The scarcity of enforcement resources makes some discontinuity inevitable, but some distributions of legal services will create greater discontinuity than others.

Second, some rights or interests are more important than others. The legal system routinely makes judgments about the relative value or importance of different rights and interests. In constitutional law, it distinguishes "fundamental" rights and "compelling" interests from others for the purpose of delimiting the realm of permissible state activity, and it weighs the importance of different legal rights and interests in deciding when the state must provide legal counsel or other assistance in the enforcement process. In civil law, it weighs the relative merits of competing interests in formulating substantive standards of conduct, in deciding whether particular claims warrant the creation of private rights of action, and in deciding how the benefits and burdens of procedural or evidentiary rules should be allocated. Even in criminal law, with its traditionally stronger commitment to categorical norms, decisionmakers often weigh competing interests, for example, in determining when conduct formally prohibited may be considered justified. A legal system that recognizes some interests as more important than others should try to distribute legal resources in a way that protects the most important ones.

Third, the distribution of legal resources is important because the practical value of some rights depends more on the relative than on the absolute amount of the citizen's enforcement resources. Such rights include rights of access to partly competitive lawmaking and administrative processes (including judicial lawmaking). The citizen's ability to make use of such rights depends as much on the level of others' resources as it does on the level of her own. Our legal ideals

²⁶ See L. FULLER, *THE MORALITY OF LAW* 81-91 (rev. ed. 1969).

support some degree of equality in the distribution of resources necessary to enforce those rights.²⁷

Thus, the prevailing approaches to legal ethics should be faulted, not for failing to guarantee full access to the legal system, but for failing to contribute to an appropriate distribution of this necessarily scarce resource.

The principal area where the dominant views recognize the importance of an appropriate distribution of legal resources is in that of the public prosecutor. The fact that the public prosecutor distributes scarce enforcement resources among a broad range of potentially enforceable claims is one of the reasons for both the higher ethical standard and the requirement of complex, flexible judgment connoted by the ideal of responsible "prosecutorial discretion." With respect to private lawyers, however, the dominant approaches hardly address the distribution issue at all. The only responsibility they impose with respect to the merits of clients' goals and claims is a threshold one. The libertarian "arguably legal" threshold is the lowest conceivable one. The regulatory threshold may be higher, but the number of claims and goals that can meet this threshold vastly outstrips the resources available to enforce and pursue them, and the regulatory approach is indifferent to how legal services are distributed among such claims and goals.

The proper standard requires not only a threshold judgment, but also a relative one. In deciding whether to commit herself to a client's claims and goals, a lawyer should assess their merits in relation to the merits of the claims and goals of others whom she might serve. The criteria the lawyer should employ in making this assessment are suggested by the bases of legal concern about the distribution of services: the extent to which the claims and goals are grounded in the law, the importance of the interests involved, and the extent to which the representation would contribute to the equalization of access to the legal system.

Of course, merit cannot be the only consideration to determine how the lawyer allocates her efforts. The lawyer's financial interests are also necessarily important. But the financial considerations that tacitly determine the distribution of legal services under the dominant approaches are substantially arbitrary in relation to the most basic goals of the legal system — those concerning legal merit. Lawyers can mitigate the tendency of the market to produce an inappropriate

²⁷ A variety of laws reflect this point, including those restricting *ex parte* and undisclosed contacts with officials, those regulating lobbying and campaign finance, and those extending access to the courts through fee waiver, fee shifting, and the class actions. For a survey of such provisions in the administrative and legislative spheres, see H. LINDE, G. BUNN, F. PAFF & W. CHURCH, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* 174-220, 263-71, 339-457 (2d ed. 1981).

distribution of legal services by integrating considerations of relative merit into their decisions about whom to represent and how to do so. In making such judgments, lawyers will have to balance their legitimate financial concerns with their commitment to a just distribution of legal services. A lawyer who cannot refuse to assist a particular client without impairing her ability to earn a reasonable income may have to compromise her judgments of relative merit more than one who can say no without great financial sacrifice. It may or may not be desirable for the bar to prescribe collectively how individual lawyers should strike this balance. The minimum that the discretionary approach requires is that the lawyer try in good faith to take account of relative merit in her decisions.

The type of consideration urged here simply extends to conventional practice the kind of judgments many lawyers now make in pro bono practice. Lawyers who do pro bono work usually choose cases in accordance with some estimate of the relative merits of the claims competing for their services. The judgments made in pro bono practice illustrate the possibility of judgments of relative merit, and they show that financial considerations do not invariably swamp ethical ones in practice. However, the limitation of this type of ethical discretion to the pro bono sphere is arbitrary. A client's ability to pay is not an irrelevant consideration, but there is no reason why it should preclude all assessment of relative merit.

In 1985, Covington & Burling, the Washington D.C. law firm, decided to stop representing the government-owned South African Airways.²⁸ Covington's decision was severely criticized from the perspective of the libertarian approach.²⁹ The decision seems plainly wrong from the point of view of the more demanding version of the libertarian standard, the one that suggests that the lawyer should take claims that meet the "arguably legal" threshold, so long as the client can pay and the lawyer is competent and available to handle them. Other variations on the prevalent approaches would accord lawyers a personal privilege to decline cases and clients they find distasteful.³⁰ On the other hand, from the point of view of the discretionary approach, Covington had a professional duty to consider the relative merits of the claims and goals of South African Airways and those of others whom the firm might represent, and, if they found the airline's

²⁸ See Marcus, *Covington & Burling Drops South African Airline as Law Client*, Wash. Post, Oct. 5, 1985, at C3, col. 1. Some background about the firm's work for South African Airways is given in M. GREEN, *THE OTHER GOVERNMENT* 196-99 (1975).

²⁹ See, e.g., Morgan, *Bad for Lawyers, Bad for Lawyering*, N.Y. Times, Oct. 11, 1985, at A35, col. 1.

³⁰ See, e.g., MODEL RULES, *supra* note 4, Rule 1.16(b)(3) (stating that a lawyer "may" withdraw if her client insists on pursuing an objective the lawyer considers "repugnant").

claims and goals to have relatively little merit, to take the action they did.³¹

Let us assume, as seems quite likely, that South African Airways is implicated in the South African system of racial subordination in a variety of ways: through its employment and customer practices in South Africa, through its contribution to an international network of businesses that enriches South Africa and strengthens the current regime, and through its participation in the United States in public relations efforts that promote or apologize for South Africa's racial policies. Let us further assume that although the representation in question does not directly involve defending South African racism, it makes no contribution to alleviating it either.

Given these assumptions, the airline's request for representation even in conventional business matters should have had a low priority. These activities support a system that violates some of the most fundamental norms of our legal culture. Our domestic equal protection laws do not purport to have extraterritorial effect, but they do purport to express our basic commitments (in contrast to, say, our traffic laws that mandate driving on the right), so that they are pertinent to any appraisal we might make of extraterritorial conduct. Moreover, South Africa's apartheid regime violates basic international law norms that our legal system recognizes.³² These laws would not have required courts or agencies to sanction the airline or to deny it the benefits it sought, but the issue for Covington was not the threshold one of permissibility or enforceability, but the relative one of merit in comparison to the claims and goals of other potential clients. For that purpose, these laws suggest that the airline's goals and claims should be disfavored.³³

³¹ The analysis in this and the following examples is highly compressed, and even a fuller elaboration might not convince some readers of my conclusions. The main purpose, however, is to illustrate a manner of thinking about such issues, not to support specific conclusions.

³² U.N. CHARTER arts. 55-56; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71, art. 2 (1948).

³³ Courts and agencies sometimes draw on legal norms not directly applicable to disfavor conduct that is not unlawful in any threshold sense. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 592-94 (1983) (relying on fourteenth amendment equal protection cases to deny charitable tax exemption to private school engaging in constitutionally permissible race discrimination); *TV 9, Inc. v. FCC*, 495 F.2d 929, 935-38 (D.C. Cir. 1973) (holding that, in a comparative broadcast licensing proceeding, norms of racial equality require the FCC to disfavor applicants without minority ownership participation). This practice is an instance of the more general one of relying on legal rules that are not directly applicable to inform judgment under discretionary norms. *See, e.g.*, *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 899-900 (3d Cir. 1983) (relying on first amendment cases to invalidate discharge of "at will" employee for constitutionally unprotected expression as against "public policy"); *E. FARNSWORTH, CONTRACTS* § 12-7, at 835-36 (1982) (discussing common law denial of specific performance for personal service contracts as against "public policy" based in part on norms against "involuntary servi-

The goals and claims of other businesses not so radically implicated in systems of racial subordination would, other things being equal, have greater merit. And if we broaden the range of potential clients to include individuals or groups with claims that are a matter of basic dignity or economic survival, it is clear that there is a vast range of people whom Covington might represent that have more meritorious positions. These potential clients probably would be unable to pay the fees that South African Airways was willing to pay. It might have been appropriate for the Covington lawyers to give some consideration to any financial sacrifice they incurred as a result of turning away the airline, but if they concluded that considerations of relative merit outweighed their financial interests, they were obliged to do as they did.³⁴

B. Internal Merit

The second aspect of the lawyer's assessment of merit involves an attempt to reconcile the conflicting legal values implicated directly in the client's claim or goal. These conflicts usually arise in the form of the overlapping tensions between substance and procedure, purpose and form, and broad and narrow framing.³⁵

By tending to privilege one or the other of the conflicting elements, the conventional approaches discourage the lawyer from confronting these tensions. In doing so, they authorize or require the lawyer to act in a way that she would concede, were she encouraged to make a judgment on the issue, frustrates the most legally appropriate resolution of the matter. By contrast, the discretionary approach requires that the lawyer make her best effort to achieve the most appropriate resolution in each case.

The discretionary approach does not ignore considerations of institutional competence. It does not assume that the full responsibility

tude"). Thus, it should not seem anomalous to suggest that, even though the conduct of South African Airways is not directly prohibited by our race discrimination laws, a decision to refuse to represent the Airways could be grounded legally on ideals underlying those laws.

³⁴ Many believe it improper to represent South African Airways under any circumstances, either because its claims and goals lack even a minimal threshold of legal merit or because of extralegal considerations. The point here is that a lawyer cannot fulfill even her purely professional responsibilities merely by deciding that the claims or goals meet a minimum threshold of merit. She must also consider them relative to the claims and goals of other people she might represent.

³⁵ In speaking of "overlapping tensions," I mean that every difficult issue of legal ethics involves all three tensions, but typically in any given situation one seems more salient and troubling than the others. On the substance versus procedure tension, see Simon, cited above in note 1. On the purpose versus form tension, see Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). On broad versus narrow framing, see Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 611-42 (1981).

for a proper resolution rests on the lawyer alone. It is compatible with the conventional understanding of the role of judicial and administrative officials in law enforcement. The discretionary approach is distinctive, first, in treating the premises of that understanding as rebuttable presumptions that do not warrant reliance when they do not apply, and second, in imposing a more flexible and demanding duty on the lawyer to facilitate official decision when the premises do apply.

1. *Substance Versus Procedure.* — One manifestation of the substance versus procedure tension is the lawyer's sense of the limitations both of her individual judgment of the substantive merits of the dispute on the one hand and of the established procedures for resolving it on the other. We could tell the lawyer to work only to advance claims and goals that she determined were entitled to prevail. The most important objection to this precept is not that the lawyer's decisions about the merits would be controversial — the decisions of judges, juries, and executive officials may also be controversial. Instead, the most important objection is that judges, juries, and executive officials acting within the relevant public procedures are generally able to make more reliable determinations on the merits than the individual lawyer.³⁶ But the qualification "generally" is crucial. The lawyer will often have good reason to recognize that the standard procedure is not reliably constructed to respond to the problem at hand, and she will often be in a position to contribute to its improvement.³⁷

The basic response of the discretionary approach to the substance-procedure tension is this: the more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume

³⁶ It makes no difference to my argument whether "reliable" is understood in terms of decisional accuracy, intrinsic procedural fairness, or democratic legitimacy.

³⁷ There are at least three important reasons why this is so. First, many procedures depend on the initiation of claims by people who lack information about their rights or who lack the material or emotional resources necessary to pursue their claims. Moreover, most claims that are initiated are resolved by settlement or default, with little or no participation by judges or officials. In such situations, lawyers aware of the issues are often the only legal professionals with any practical opportunity to take responsibility for the lawfulness and justice of the outcome.

Second, even in cases determined by officials, lawyers often have better information than the deciding officials about particular aspects of the case or even about the case as a whole. For example, judges who rule on disputes over the disclosure and presentation of evidence typically do so with much less information than counsel about the importance of the evidence in question.

Third, even with full information, the deciding official may not be as well positioned as the established procedure assumes to make a reliable decision. Perhaps the official is corrupt, politically intimidated, prejudiced, or incompetent. Or perhaps there has been some breakdown in the process that undermines the enforceability of the official's decision. For example, its value may be unfairly discounted by delay, or the sheriff may be unable to enforce it.

for the substantive justice of the resolution; the less reliable the procedures and institutions, the more direct responsibility she need assume for substantive justice.

This means, to begin with, that the lawyer needs to develop a style of representation that will, in the general procedural context in which she practices, best contribute to just resolutions. This will normally be the regulatory "on the merits" style, but it may incorporate some elements of the libertarian "arguably legal" style. The distinctive feature of the discretionary approach is that the lawyer must treat this style as a set of weak presumptions. Once the lawyer formulates her general style, she must watch for indications that some premise underlying her judgment that the style is a good one does not apply in the particular case and, when she finds them, revise the style accordingly.³⁸

The most common reasons why some premise will be inapplicable are an unusual degree of aggressiveness or vulnerability on the part of another party or an unusual incapacity on the part of official institutions. The lawyer should respond to such circumstances by taking reasonably available actions that help restore the reliability of the procedure. By directing the lawyer to attempt first to improve the reliability of the procedure, the discretionary approach respects the traditional premise that the strongest assurance of a just resolution is the soundness of the procedure that produced it. But to the extent that the lawyer cannot neutralize or repair defects in the relevant procedure, she should assume direct responsibility for the substantive validity of the decision. She should make her own judgment about the proper substantive resolution and take reasonable actions to bring it about.

Consider a well-known scenario involving two lawyers negotiating a personal injury case.³⁹ The plaintiff is an indigent who has suffered severe injury as a result of the undisputed negligence of the defendant, but he may have negligently contributed to his own injury. During negotiation, the insurance company lawyer conducting the defense realizes that the plaintiff's lawyer is unaware that a recent statute abolishing the contributory negligence defense would apply retroactively to this case. The plaintiff's lawyer is negotiating under the assumption that there is a substantial probability that his client's negligence will entirely preclude recovery when in fact there is no such probability. The defense lawyer proceeds to conclude the negotiation without correcting the mistaken impression.

³⁸ Kadish and Kadish call something like the conception of role invoked here "recourse role," see M. KADISH & S. KADISH, *supra* note 24, at 35, but they treat it as more exceptional and problematic (and do not apply it to private lawyers). In contrast, I believe that such a conception of role is presumed in the conventional ideal of professional work.

³⁹ See G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 586-91 (1978).

Gary Bellow and Bea Moulton, who tell this tale, incline here toward the regulatory approach.⁴⁰ Proponents of the libertarian approach might prefer a scenario in which the victim of nondisclosure is not an indigent and the beneficiary is not an insurance company. For this purpose, we can recall Monroe Freedman's tale of a divorce lawyer opposing the "bomber" who has no value in life other than stripping the husband of every penny and piece of property he has, at whatever cost to the personal relations and children, or anything else."⁴¹ The libertarian and regulatory approaches would resolve these cases through categorical rules, of nondisclosure in the libertarian approach or disclosure in the regulatory approach. The discretionary approach requires a more complex judgment.

In the personal injury case, the critical concern for the defense lawyer should be whether the settlement likely to occur in the absence of disclosure would be fair (in the sense that it reasonably vindicates the merits of the relevant claims). On the facts given, it seems probable that the settlement would not be fair. The plaintiff's lawyer probably set her bottom line well below the appropriately discounted value of the plaintiff's claims because of her mistake about the law. Here the defense counsel's responsibility is to move the case toward a fair result, and the best way to do this is probably to make the disclosure and resume the negotiation. This duty is triggered by the fact that, without some assistance from defense counsel, the procedure cannot be relied on to produce a just resolution. The plaintiff's counsel's mistake is a major breakdown in the procedure, and since the case is headed toward pretrial settlement, there will be no further opportunities for counsel, judge, or jury to remedy the breakdown.

The defense counsel should also assess the likelihood that disclosure will backfire and lead to a less fair result because the plaintiff's counsel takes this information and then tries to get more than she is entitled to through some aggressive tactic of her own. But this risk seems small if, as the scenario suggests, the defendant's lawyer is more experienced than the plaintiff's, the latter has not been aggressive, and the matter seems likely to be wound up before the plaintiff will have an opportunity to make new maneuvers. In Freedman's divorce case, things may be different; disclosure may prompt escalation of the already unfairly high level of demands by the "bomber." If so, then disclosure might be deferred until future developments indicate whether the case is likely to be resolved fairly without disclosure. The lawyer's duty is not discharged, however, until she either makes disclosure or the case reaches a fair resolution without her doing so.⁴²

⁴⁰ See *id.* at 604-06.

⁴¹ *Gathering*, *supra* note 17, at 652-53.

⁴² Of course, the lawyers with the information should also consider whether their clients have some interest independent of the substantive merits of the claims that would warrant

Now consider a case in which the breakdown arises from incapacity on the part of official institutions. Suppose an experienced tax practitioner has conceived a new tax avoidance device. She herself is convinced that it is improper, but there is a nonfrivolous argument for its legality.⁴³ The lawyer might believe that the Internal Revenue Service and the courts are best situated to resolve such questions. She might reason that the agency and the courts have greater expertise than she, that they are better able to resolve issues in a way that can be uniformly applied to similar cases, and that they are subject to various democratic controls. However, such arguments are plausible only to the extent that the agency and the courts *will in fact make an informed decision on the matter*. The arguments do not warrant the lawyer using the device in a case where the agency and the courts will never effectively review it. This might happen because the agency lacks sufficient enforcement resources to identify the issue or to take the matter to court.⁴⁴ In such a situation, the lawyer should respond to the procedural failure. She can do so by trying to remedy it, for example, by bringing the issue to the attention of the IRS. If that course is not possible (for example, because the client will not permit it), or if it will not be sufficient to remedy the procedural deficiencies (for example, because the agency is so strapped that it cannot even respond to such signals), then the lawyer has to assume more direct responsibility for the substantive resolution. If she thinks that the device should be held invalid, she should refuse to assist with it. In these circumstances, she is the best situated decisionmaker to pass on the matter.

In situations in which the procedure is sufficiently reliable that the lawyer need not assume direct responsibility for the substantive merits, she retains a duty to take reasonably available actions to make the procedure as effective as possible and to forego actions that would reduce its efficacy. When she need not consider the substantive merits herself, she should do what she can to facilitate the adjudicator in doing so.

Take an issue of deceptive impeachment tactics. Is it appropriate for the lawyer in cross-examining a handwriting expert surreptitiously

nondisclosure. In some cases there may be privacy or proprietary reasons militating against disclosure. In the personal injury case, however, when the information concerns the status of a legal rule, it is hard to see any such interest. Legal rules are very much in the public domain. In the divorce case, the information concerns the husband's finances, in which he should have no proprietary or privacy interest as against his wife.

⁴³ In the jargon of tax practitioners, she believes that there is a "reasonable basis" for the device, but does not believe that there is "substantial authority" for it or that it is "more likely than not" that the device is allowable. Cf. Special Committee on the Lawyer's Role in Tax Practice, The Association of the Bar of the City of New York, *The Lawyer's Role in Tax Practice*, 36 TAX LAW. 865, 866-69 (1983).

⁴⁴ See Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553, 1577-96 (1980) (discussing the "audit lottery").

to substitute a writing with a signature different from the one the witness has identified in the hope that the witness will not notice the substitution and continue to insist on what will then be a demonstrably mistaken identification?⁴⁵ The libertarian "arguably legal" standard tends to permit such tactics; the regulatory "on the merits" standard tends to condemn them. Under the discretionary approach, the matter requires an inquiry into whether the tactic is likely to contribute to the adjudicator's ability to decide the case fairly. To the extent that the lawyer has no knowledge that will not be presented at hearing, the ethical issue will not be urgent because, to the extent the tactic fails to contribute to a fair understanding of the issues, the adjudicator can discount it appropriately. But if the lawyer has knowledge or insight that will not be formulated as admissible evidence,⁴⁶ the ethical issue may be important. Suppose that the lawyer's extra-record knowledge indicates that the witness is highly competent and the identification is correct but that the tactic might be effective because the witness is prone to nervousness and distraction in public appearances. Here the tactic is likely to detract from, rather than to enhance, the adjudicator's ability to decide fairly. On the other hand, suppose that the lawyer has extra-record knowledge suggesting that the witness is not competent and the identification is mistaken. Here she might plausibly decide that the tactic would contribute to a fair decision.

In this case, the ethical concerns arise from the fact that, even in a relatively reliable procedure, the lawyer typically has some opportunities to improve her client's chance of success in ways that, were

⁴⁵ See *In re Metzger*, 31 Haw. 929 (1931) (categorically holding the tactic improper).

⁴⁶ The most important reason why probative information is not offered in evidence is that it is adverse to the interests of the party who has it, and the other side is unaware of it. However, even in situations in which information is equally available to both counsel, there are two reasons why lawyers may have significant insight into specific factual matters that cannot be formulated as admissible evidence. First, probative information may be excluded by the rules of evidence. This may be so because some rules, such as those of privilege, are based on considerations other than probativeness. In addition, it may be so because most of the rules, and especially the hearsay rules, are overbroad: they exclude some probative evidence in order to obviate ad hoc determinations distinguishing probative from nonprobative items among those covered by the rule. See J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 226-29 (1825). The rules presume that such judgments would be unreliable or inefficient; even when this is true with respect to judges and juries, however, it is often not true with respect to lawyers. The consequent importance of probative but inadmissible evidence has been recognized in the field of prosecutorial discretion. See Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 407-08, 432-40 (1987).

The second reason why lawyers sometimes have greater insight is their relative familiarity with a particular item of evidence. Lawyers may spend years preparing a case that the trier must absorb in days or weeks. In the course of preparation lawyers may develop a tacit understanding or intuitive feel for some facts that cannot be fully articulated, or they may absorb many minor but relevant bits of information that cannot effectively be presented to the trier because of the trier's more limited ability to absorb information within time constraints. Despite or perhaps even because of this difference, the trier will often be in a better position to determine the entire case, but the lawyer often has advantages at the level of detail.

she required to consider the matter, she would acknowledge do not facilitate decision on the merits by the adjudicator. The libertarian approach relies on the judge to check such moves at the prompting of opposing counsel, but the judge, even after hearing from both sides, is often less well informed about specific factual issues than counsel. In such situations, counsel should not defer responsibility to the judge for tactics she does not believe contribute to a fair decision. Since she has an advantage in assessing the matter, she should exercise her own judgment and, when appropriate, self-restraint.

Thus, far from collapsing the lawyer's role into the judge's, ethical discretion suggests a lawyer role that complements the generally accepted understanding of the judge's role. The lawyer assumes substantial responsibility for vindicating substantive merits to the extent that the judge cannot be expected to do so. In other situations, her responsibility is to facilitate the judicial role.

Of course, one can imagine a procedural context that is so reliable as to make superfluous the type of discretion urged here: the dispute will be determined promptly, through an adjudication by a competent decisionmaker able routinely to identify and neutralize obfuscation and excessive aggressiveness, after a hearing at which both sides are ably represented and adequately financed, governed by rules and procedures that ensure full development of the evidence and issues, and where effective relief is available.

It is ironic that conventional discourse about legal ethics should often treat this ideal situation as paradigmatic. Not only is the situation rare at best, but ethical issues are here unimportant. Since, by hypothesis, relevant information is fully available and each side can counter the aggression and deception of the other, ethics collapses into strategy. No ethically questionable practice would be likely to benefit the client. Ethical issues arise because actual procedures fall short of the ideal. One of the strengths of the discretionary approach is that it acknowledges and responds to procedural imperfection.

2. *Purpose Versus Form.* — Part of the substance versus procedure tension could be considered a special variation of the purpose versus form tension. When the lawyer impeaches a witness she knows to be truthful, when she objects to hearsay she knows to be accurate, when she puts the opposing party to proof on a matter the client has no legitimate interest in disputing, she takes advantage of procedural rules designed to promote accurate, efficient decisionmaking in a way that frustrates this purpose. When judges apply rules, we expect them to take account of the purposes underlying the rules. But the judge often lacks sufficient knowledge to determine whether the relevant purposes would be served by applying the rules. The lawyer, however, often does have sufficient knowledge to do so. Nevertheless, the libertarian approach imposes no obligation on the lawyer in such situations to see that the rules she invokes are applied in a manner that takes account of their purposes.

The argument so far suggests that a lawyer's choice between a purposive or formal approach to procedural rules should depend on which approach seems better calculated to vindicate the relevant legal merits. In most contexts, considerations of merit favor a purposive approach. Yet the discretionary approach also requires the lawyer to remain alert for indications that a purposive approach might not further consideration on the merits. This point merely summarizes the substance versus procedure discussion in terms of purpose versus form. It will be useful, however, to consider the purpose versus form tension more generally because in many situations, especially those in which the lawyer must take direct responsibility for considerations of substantive merit, purpose versus form considerations are distinctively troubling.

Part of the reason for regarding law as legitimate in our culture is that it embodies the purposes adopted by authoritative lawmakers: parties to a contract, legislators enacting a statute, judges pronouncing a common law rule, the people adopting a constitution. But the legitimacy of law also depends on these intentions being embodied in the form of rules. By mediating between legislative intention and coercive application to specific cases, the rule form distinguishes law from a regime of direct personal subordination to the legislator. The rules cannot be applied sensibly without considering their underlying purposes, but the purposes can only be implemented appropriately by referring to their formal expression as rules.

In practice, such issues often arise when lawyers have an opportunity to shape an activity or a transaction in a way that seems consistent with a plausible surface interpretation of a rule but that appears to undermine its purpose. For example, a divorced husband who agreed upon separation to pay his ex-wife a percentage of his income for five years might try to save money by making arrangements with his employer to defer his income until after the alimony period expires. Or the owner of a fleet of taxicabs might attempt to shield his business assets from tort liability by holding each cab through a separate corporation.⁴⁷

The libertarian approach tends to license the manipulation of form to defeat purpose; the regulatory approach tends to forbid such manipulation. The discretionary approach responds to the purpose versus form tension in terms of the following maxim: the clearer and less problematic the relevant purposes, the more the lawyer should consider herself bound by them; the less clear and more problematic the relevant purposes, the more justified the lawyer is in treating the relevant norms formally. Treating them formally means understanding them to permit any client goal not plainly precluded by their

⁴⁷ See *Walkovszky v. Carlton*, 18 N.Y.2d 414, 418-19, 223 N.E.2d 6, 8-9, 276 N.Y.S.2d 585, 588-89 (1966).

language. "Problematic" purposes are purposes that pose an especially grave threat to fundamental legal values.⁴⁸ The discretionary maxim is grounded in the practice in our legal culture of attributing an especially high burden of formal specification to such purposes. The most well-established examples are those involving criminal penalties and civil burdens on constitutional rights.⁴⁹ Other kinds of purposes that have been considered problematic include those of transferring wealth to or conferring economic power on powerful interest groups, and of conferring anomalous tasks on the courts.⁵⁰

Here is an example involving a clear, unproblematic purpose. The client is a highly paid hotel manager. The lawyer determines that the client could save a good deal in taxes by renegotiating his contract with his employer so that in return for a reduction in cash compensation he receives and agrees to reside in lodging on the hotel premises. The lawyer must decide whether to suggest this arrangement to the client, or if the client has suggested it, she must decide whether to implement it. Assume that some institutional failure makes it inappropriate to rely on the IRS to determine the case, so that the lawyer must take substantial direct responsibility for the substantive merits.

If there is any authorization for the arrangement in the income tax laws, it lies in a statutory provision exempting lodging furnished by the employer on its premises when the arrangement is "for the convenience of the employer" and is "required . . . as a condition of . . . employment."⁵¹ The rule arguably permits the contemplated arrangement — the employment contract could be drafted to impose such a "requirement."

Suppose the lawyer interprets this provision to express a belief that when an employee receives in-kind benefits as part of his job, it

⁴⁸ When the purpose is problematic, treating the rule formally is appropriate because a problematic purpose threatens or burdens either a client goal of special significance or some more general autonomy interest to which the law gives special protection (for example, privacy). When the purpose is merely unclear, this treatment is justified by a residual background presumption that private conduct that does not offend public purposes (or private rights) is permissible.

⁴⁹ See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (declaring a criminal vagrancy statute void for vagueness); *Kent v. Dulles*, 357 U.S. 116 (1958) (narrowly construing a statute to avoid granting the Secretary of State the power to abrogate the right of foreign travel of alleged Communists); H. HART & A. SACKS, *supra* note 22, at 1413-15.

⁵⁰ See Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 22-35 (1957); Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 819 (1983).

⁵¹ 26 U.S.C. § 119(a) (1982). This example was suggested in M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 35 (1987).

In order to focus on the substance versus procedure and purpose versus form issues in this and other examples, I ignore the issue that would arise if other practitioners commonly engaged in the practice in question. For the moment, let us assume that the contemplated tax plan is moderately innovative and has not been widely used in these precise circumstances. I discuss the significance of the conduct of other practitioners in Part III, section c below.

would be unfair to tax him on their full market value because they are probably worth considerably less to him, both because he associates them with work and because he cannot exchange them for things he may want more, as he could with cash. The in-kind benefits probably have some value to the employee, but to estimate this value in each case would be administratively impractical, and no plausible general presumption would be accurate in a large enough percentage of cases to warrant its use. Thus, according to this theory of the statute, exempting the income is the fairest practical approach.

Suppose that the lawyer decides that it would not be consistent with the statutory purpose to apply the exemption to arrangements the taxpayer has chosen or initiated. In such situations, it is more reasonable to presume that the taxpayer does value the benefits at the amount of the agreed salary reduction or at their market value. Even if this procedure does not entirely resolve the valuation problem, the difficulty has been created by the taxpayer's own actions. Thus, the lawyer concludes that the exemption should not be available for the contemplated transaction.

Suppose further, however, that courts in the relevant jurisdiction have rejected IRS challenges to analogous in-kind arrangements initiated by taxpayers.⁵² The lawyer's theory of institutional competence suggests that the court's decisions are more authoritative than her own views on the substantive merits. Accordingly, she is inclined to decide that there is merit to the contemplated arrangement. But the analysis is not yet complete. She still ought to consider the purposive basis of the court's rulings. Suppose she concludes that the rulings are based not on a judgment that such arrangements are consistent with the substantive purposes of the statute, but on a belief that it would be too costly to determine whether each particular transaction was in fact chosen or initiated by the taxpayer. At this point, the lawyer should review her theory of institutional competence. It may be impractical for the courts and the IRS to make such determinations, but quite practical for the tax lawyer to do so, especially if the lawyer came up with the idea herself and has not yet communicated it to the client. Since the lawyer believes that the relevant purpose is clear and not problematic, she should not proceed with a plan that would frustrate the purpose.

Now consider a case in which the relevant purpose is less clear and more problematic. The client is a public assistance recipient under the Aid to Families with Dependent Children program. She and her child live, rent-free, in a home owned by her cousin. Under the applicable regulations, the receipt of lodging "at no cost" is considered "income in kind" that requires a reduction of about \$150 in

⁵² See, e.g., *Caratan v. Commissioner*, 442 F.2d 606, 609-11 (9th Cir. 1971).

the welfare grant.⁵³ The lawyer has to decide whether to recommend that the client make a nominal payment of, say, five dollars to the cousin so that she would no longer be receiving lodging "at no cost," and thus avoid the \$150 reduction in her grant.

Again, assume that some institutional failure requires that the lawyer take some responsibility for the substantive merits. Upon examination, she is unable to come up with a sense of legislative purpose as clear and coherent as the one involved in the tax case. On the one hand, the benefit reduction seems designed to reflect the lesser needs of people who live rent free, and the fact that the provision could be effectively nullified by the type of financial planning in question suggests that such planning was not contemplated. On the other hand, nothing in the language of the regulation suggests an intention to preclude such planning, although it would have been simple enough to do so by providing for a benefit reduction in cases of low rent payments of the difference between the rent payment and the \$150 implicit shelter allowance in the grant. (Unlike the situation in the tax case, the welfare authorities have already addressed the valuation issue in a potentially administrable way.)

Suppose that background case law and legislative history suggest that the regulation is in part a compromise between the principle that grants should reflect the lesser needs of people with low rent expense and the competing "flat grant" principle that need determinations should consider only the basic and easily determinable factors of cash income and family size. The "flat grant" principle is animated by solicitude for recipient autonomy and privacy as well as administrative efficiency concerns. In addition, the regulations seem to reflect a rough compromise between a half-hearted effort by the federal government (which subsidizes the program) to push the states to raise grant levels generally and efforts by the states to retain flexibility to lower them in some circumstances.⁵⁴ In this situation, the lawyer has no clear sense of which course of action would be most consistent with legislative purpose. It is thus proper for her to treat the regulation formally.

Even if the lawyer found stronger indication of a purpose to preclude strategic planning, she might be justified in disregarding it if she thought it problematic. A purpose is problematic to the extent that it endangers fundamental values. The lawyer might decide that the claimant's interest in a minimally adequate income is a value of exceptional legal importance, that the AFDC grant levels provide

⁵³ See, e.g., MASS. REGS. CODE tit. 106, § 304.510 (1987).

⁵⁴ See A. LAFRANCE, *WELFARE LAW: STRUCTURE AND ENTITLEMENT* 351-65 (1979); Hoey, *The Significance of the Money Payment in Public Assistance*, SOC. SEC. BULL., Sept. 1944, at 3; Rabin, *Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration*, 118 U. PA. L. REV. 1143, 1148 (1970).

considerably less than a minimally adequate income, and that the plan in question would move her closer to one.⁵⁵ Thus, the lawyer might conclude that a purpose to preclude such a plan should not be assumed without an explicit legislative statement of it. In doing so, she might apply the presumption against a problematic purpose that the Supreme Court seemed to apply in *Kent v. Dulles*,⁵⁶ a presumption reflecting both a judgment regarding probable legislative intent and a substantive policy disfavoring certain purposes by requiring more explicit articulation of them.

3. *Broad Versus Narrow Framing.* — This tension arises as ethical issues are defined. If we define an issue narrowly in terms of a small number of characteristics of the parties and their dispute, it will often look different than if we define it to encompass the parties' identities, relationship, and social circumstances. On the one hand, legal ideals encourage narrow definition of legal disputes in order to limit the scope of state intrusion into the lives of private citizens and to conserve scarce legal resources. On the other hand, making rights enforcement effective and meaningful often seems to require broadening the definition of disputes. When disputes are narrowly defined, their resolution is often influenced by factors such as wealth and power that, when we are forced to confront them, often seem arbitrary. Moreover,

⁵⁵ None of these judgments is beyond dispute, but all are solidly grounded in the legal culture. Some believe that the substantive rights the Supreme Court has recognized — as well as the most plausible general theory of American constitutional democracy — imply or strongly suggest a right to minimal subsistence. See, e.g., Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659. Although the Court has denied that interests in minimal subsistence are "fundamental" in some contexts, it has recognized them as relatively important in others. Compare *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding that welfare interests are not fundamental for equal protection purposes) with *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that welfare interests are fundamental for procedural due process purposes); see also Grey, *Procedural Fairness and Substantive Rights*, in 18 NOMOS: DUE PROCESS 182-202 (J. Pennock & J. Chapman eds. 1977) (arguing that *Goldberg* makes sense only on the assumption that some substantive welfare interests are constitutionally protected). Although the Court's decisions deny a substantive constitutional right to a particular level of subsistence or to "strict scrutiny" of welfare classifications, they do not rule out the proposed practice of giving welfare interests sufficient weight to generate a presumption against interpretations of legislative norms that would impair them.

Determining whether the benefit level in the absence of the plan in question would ensure minimal subsistence is not easy, but there is guidance available for such determinations. The most authoritative general standard of minimal need is the federal poverty standard, which Congress and various agencies use for precisely this purpose. See UNITED STATES DEPT OF HEALTH, EDUCATION, AND WELFARE, *THE MEASURE OF POVERTY* 5-7, 14-17 (1976). The AFDC grant levels in most states, even when supplemented by food stamps, are well below these standards. See S. LEVITAN, *PROGRAMS IN AID OF THE POOR FOR THE 1980s*, at 2-3, 29-32 (4th ed. 1980). When the issue of minimal subsistence arises in such states, the federal standards support the lawyer's judgment.

⁵⁶ 357 U.S. 116 (1958) (resolving statutory ambiguity against purposes that would burden constitutional interest in travel abroad). *King v. Smith*, 392 U.S. 309 (1968), in which the Court strained heroically to adopt a tortured statutory interpretation favoring welfare recipients, might be understood as tacitly applying the *Kent* approach to welfare interests.

the growth of government regulation and civil rights enforcement has produced a large number of legal norms that regulate broadly the structures of relationships and organizations. Thus, large scale public institutional reform or antitrust litigation often challenges and seeks to transform the basic identity of the defendant.⁵⁷

The broad versus narrow definition tension substantially overlaps the other tensions. For example, in debates that I characterized in terms of substance versus procedure, Monroe Freedman responds to regulatory arguments by hypothesizing situations in which candor and openness may impede the appropriate substantive resolution because of some procedural deficiency. A famous example concerns whether a criminal defense lawyer should cross-examine a prosecution witness who accurately places the defendant near the scene of the crime about her defective vision.⁵⁸ In Freedman's scenario, although the testimony is accurate and thus the contemplated impeachment seems irrelevant, the defendant is in fact innocent but lacks an alibi and is the victim of some unlucky circumstantial evidence. So the proper resolution — acquittal — may depend on the willingness to impeach the truthful witness. Similarly, in the divorce case mentioned above,⁵⁹ for the husband to disclose hidden income would aggravate the injustice of the probable resolution because the wife's lawyer will take advantage of the information while continuing to pursue a variety of aggressive tactics of his own. What Freedman does in these examples is to broaden the frame. The issue initially posed is one of candor about a specific piece of information. He insists that the matter be viewed in the context of the other evidence and in terms of the likely incremental influence of disclosure on the resolution. Nevertheless, broad framing has no place in Freedman's view of individual lawyer decisionmaking. At that level, he adopts the general libertarian practice of narrow framing. He favors a categorical duty of aggressive impeachment of vulnerable witnesses regardless of the surrounding context. Freedman adopts the broader perspective only when he takes the point of view of the rulemaker deciding whether to mandate cross-examination in this context.

In contrast, the discretionary approach gives individual lawyers substantial responsibility for determining whether broad or narrow framing is appropriate in the particular case. It suggests that the lawyer should frame ethical issues in accordance with three general standards of relevance. First, a consideration is relevant if it is implicated by the most plausible interpretation of the applicable law.

⁵⁷ See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298-302 (1976).

⁵⁸ See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474-75 (1966).

⁵⁹ See *supra* p. 1089.

Issues tend to be defined more narrowly under legal norms that regulate narrowly. For example, traffic laws suggest narrower framing than family laws. Second, a consideration is relevant if it is likely to have a substantial practical influence on the resolution. Issues tend to be defined more narrowly to the extent that the parties are situated so that substantively irrelevant factors are not likely to influence the resolution. Equality of resources and of access to information are among the more important factors weighing toward narrow definition under this second standard. Third, knowledge and institutional competence will affect the appropriate framing. More broadly framed issues tend to require more knowledge and more difficult judgments. When the lawyer lacks needed knowledge or competence, narrow framing becomes more appropriate.

Here is an extended example.⁶⁰ A wealthy private university has a collective bargaining agreement with a local union representing its clerical and technical workers. The workers had previously been organized as a single-employer local, but they merged with a larger local representing workers from several employers shortly before the most recent contract negotiation. The merger was not a success, however, and the university workers' leaders and the officials of the multi-employer local agreed that the university workers should revert to a single-employer local. Accordingly, the multi-employer local purported to delegate its representative function to the reconstituted single-employer local and disclaimed any interest in representing the university workers. A few weeks later the reconstituted local held an election of the bargaining unit members in which the new arrangement was approved by a five to one margin, though with only about fifty-five percent of those eligible voting. The reconstituted local has not made or proposed any changes in internal membership rights or in the terms of the existing collective bargaining agreement.

On the advice of counsel, the university now refuses to recognize the local or to pay over dues to it under the "check-off" provisions of the collective bargaining agreement. It asserts that the multi-employer local could not administratively transfer representative authority without an election and that from the time it disclaimed interest the workers ceased to be represented. Since the reconstituted local was not the authorized representative of the workers at the time the election was held, it had no authority to conduct the election, and the vote was therefore invalid. The university argues further that the hiatus between the disclaimer and the election and change in the unit's size, officers, and internal procedures from the transfer indicate that there is not sufficient "continuity" between the prior multi-employer

⁶⁰ This example is inspired by events at Stanford University in 1984. Because I have altered the facts, I offer it as a hypothetical.

local and the reconstituted one to warrant continued recognition without a certification election conducted by the National Labor Relations Board.⁶¹

The union regards the demand for an election burdensome, not only because it duplicates the internal election already held, but because it would be considerably more expensive in terms of time, energy, and money. The NLRB election procedures give the employer greater opportunity to campaign against the local and make it possible for other unions to compete for certification. The local would thus have to devote a lot of resources to its own campaign. Moreover, the university might be able to cause additional delay and expense by challenging the results of the certification election before the NLRB, a proceeding that could take years to resolve.⁶² On the other hand, the local's only practical recourse for the university's refusal to recognize it or pay over dues is to file a complaint with the NLRB, which will definitely consume large amounts of time and money before effective relief can be obtained.

So far, the ethical issue for university counsel seems to be one of substance versus procedure and purpose versus form. The delay and expense of NLRB proceedings arise from a procedural breakdown, which triggers some responsibility on the part of university counsel to assess the substantive merits of the university's arguments. This argument is not frivolous, but it seems supported only by formal considerations that undercut the relevant statutory purposes. Most of the argument would have been mooted by an election held before the multi-employer local disclaimed interest, and there is no reason to think that the vote would have been different then. The clear reason for delay is carelessness on the part of the local, but this carelessness does not seem to have prejudiced anyone. The internal changes accompanying disaffiliation are substantial, but they involve a return to the old pre-affiliation structure with which most workers were familiar, and there is no indication of worker dissatisfaction with it. The university's argument thus does not seem supported by the labor act's purpose that unions be genuinely representative of the bargaining unit. Moreover, it seems to frustrate another relevant statutory purpose — to minimize employer disruption of union operations and intervention into union affairs.⁶³

Nevertheless, describing the matter in this way ignores many of the considerations that are most important to the parties and their

⁶¹ Cf. Comment, *Union Affiliations and Collective Bargaining*, 128 U. PA. L. REV. 430, 440-53 (1979) (discussing the "continuity of representation" doctrine).

⁶² Cf. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1795-97 (1983) (discussing the debilitating effects of NLRB delay in unfair labor practice cases on union organizing efforts).

⁶³ See *NLRB v. Financial Inst. Employees*, 475 U.S. 192, 203, 209 (1986).

lawyers. Although the lawyers have framed the issue in their briefs in terms of only the limited sequence of events described above, they and their clients understand the ethical issues in terms of broader perspectives on a complex and longstanding relationship that has become increasingly acrimonious and mistrustful.

In the view of the university and its lawyers, the local is in the hands of zealots who are out of touch with the membership. These leaders prefer rhetorical and ideological posturing to pursuing the concerns of the rank and file. They have dissipated the union's resources in a huge number of unsuccessful grievances. They have precipitated costly strikes over issues of little importance to the membership. They have generated hostility around collective bargaining that has poisoned personal relations within the university without making any practical improvement in the union's bargaining position. The members have not been able to hold the leaders accountable because they have been confused by deceptive statements by the leaders, because some of them fear retaliation by the leaders, and because few of them can devote the time and energy necessary to mount a challenge to the established union power structure. From this perspective, an NLRB election would facilitate membership reconsideration of its own interests in a setting that provides the university with an opportunity to counter the deceptions of the union leaders, while the NLRB's presence would undercut intra-union intimidation.

From the perspective of the union leaders and their lawyers, the university's conduct represents oppressively paternalistic anti-unionism. University officials have been blinded by their biases about what workers want and by their own preferences for an informal work environment in which elite professionals have untrammelled discretion. They thus have failed to take seriously the union's noneconomic demands and have failed to recognize the need for reforms that would constrain their power. Their hostility towards union leadership arises from an understanding of the role of the union — one that precludes all forms of militance and limits it to a narrowly economic and disciplinary role — that is at odds with the one held by most workers. The university has negotiated aggressively in collective bargaining even over the most basic concessions and has energetically defended grievances without regard to their merits. Forcing the union to conduct a new certification election will exacerbate the effects of this prior course of conduct. The unmistakable message — that while they have a union they can expect an exhausting and expensive struggle to achieve and maintain every concession — will demoralize and demobilize many members.

If the issue is framed broadly and if the university's view is accepted, the case for the university's aggressive course of action seems stronger. The chances that the university's course will succeed on the

merits are slim, and it is certain to impose a heavy burden on the union. Yet from a broader view this burden might seem justified, since the threatened representative structure seems a legally inappropriate one.

In some respects, the statute seems to support reliance on this broader interpretation. Broad framing seems supported by the first two of the three standards of relevance suggested above. First, the matter is governed by a statute that regulates broadly; the labor act is designed to constitute and protect relationships. Insuring representative union structures is one of its principal goals. Second, the university's interpretation suggests that its aggressive tactics prevent legally irrelevant factors, such as the manipulations of the local's leaders and the inability of many workers to invest much time in union politics, from affecting resolution.

Yet the third framing standard suggests serious objections to this line of thought. It seems inconsistent with the statute's premises about institutional competence. The applicable law accords the union a presumption of representativeness that the employer must rebut by "objective considerations."⁶⁴ The NLRB would not consider any of the impressions on which the university bases its broad interpretation competent as rebuttal. Even though these impressions are not sufficient for the purposes of the NLRB, university counsel might think it appropriate to take account of them in deciding whether to pursue its aggressive tactic. The university might see an analogy between this approach and the practice of prosecutors of taking inadmissible evidence into account in deciding whether to initiate a prosecution.⁶⁵

However, the analogy is not strong. The university counsel should recognize that the university has a bias in the matter and that there are limitations on its knowledge of the union that are more severe than the comparable disadvantages of prosecutorial judgment. Moreover, the rules that make evidence inadmissible at a criminal trial are based in substantial part on factors other than a mistrust of prosecutorial judgment, such as concern about police misconduct, desire to protect confidential relations, and distrust of juries. By contrast, the requirement that the employer establish a basis for doubting the union's representative status by "objective considerations" seems intended to prevent the employer from causing the sort of disruption its present course creates, by precluding reliance on precisely the kind of impressions its broader view is based on. Thus, on balance, university counsel should frame the issue in relatively narrow terms that obviate judgments they are poorly situated to make. As we have seen, their aggressive tactics seem inappropriate in the narrower frame.

⁶⁴ *Id.* at 198 (quoting *United States Gypsum Co.*, 157 N.L.R.B. 652, 656 (1966)).

⁶⁵ *See Gross, supra* note 46, at 407-08, 432-40.

The question of framing seems less important for union counsel. The issues for university counsel stem from their opportunity to take advantage of the burdens that NLRB delay and expense impose on the union. For the union lawyers, regardless of whether the issue is framed narrowly or broadly, the appropriate response is to press for the quickest and cheapest possible NLRB determination. Pursuing the NLRB proceeding is the best available way for the union to protect itself against the employer's tactics, and the scenario so far suggests no reason to doubt that the NLRB proceeding is adequate to protect the *employer's* interests.

To illustrate how the framing issue might become relevant to the union lawyers, however, we could complicate matters by hypothesizing an additional concern about the reliability of the NLRB procedure. Recall that, aside from its nonfrivolous but weak claim regarding the circumstances of disaffiliation, the university cannot make the prescribed showing by "objective circumstances" of reasonable grounds for doubting the majority status of the union. As we have noted, this constraint on the employer's ability to trigger an election reflects a belief that neither the employer nor the Board is reliably situated to determine when a union is no longer representative without objective evidence. However, there may be situations in which the employer lacks sufficient evidence but the union lawyer is reliably situated to make determinations of this sort. A lawyer with a close, longstanding association with the union would not have an employer's bias and might have enough knowledge to conclude with confidence that the employer's claim of unrepresentativeness is in fact correct and that the "objective considerations" requirement will preclude the NLRB from reaching this conclusion. In this situation, institutional competence weighs in favor of broad framing. The union lawyer should not be content to rely on the weakness of the employer's narrow claim regarding disaffiliation to oppose the certification election. She should push the local leaders to submit to a test of representativeness — by a certification election if that is the best way.⁶⁶

C. The Limits of Role and Legality

The discretionary approach is grounded in the lawyer's professional commitments to legal values. It rejects the common tendency to attribute the tensions of legal ethics to a conflict between the demands of legality on the one hand and those of nonlegal, personal or ordinary

⁶⁶ This conclusion is supported by concerns of duty of loyalty to the members, who are in some collective sense the union lawyer's "client," as well as by concerns of fairness to the employer. See, e.g., MODEL CODE, *supra* note 4, EC 5-18 (prescribing duties to organizational clients); MODEL RULES, *supra* note 4, Rule 1.13 (same).

morality on the other.⁶⁷ Although critics of conventional legal ethics discourse often adopt the law versus morality characterization, its strongest influence is to bias discussion in favor of conventional, especially libertarian, responses. Typically the conventional response is portrayed as the "legal" one; the unconventional response is portrayed as a "moral" alternative. This rhetoric connotes that the "legal" option is objective and integral to the professional role, whereas the "moral" alternative is subjective and peripheral. Even when the rhetoric expresses respect for the "moral" alternative, it implies that the lawyer who adopts it is on her own and vulnerable both intellectually and practically. The usual effect is to make it psychologically harder for lawyers and law students to argue for the "moral" alternative. In many such situations, however, both alternatives could readily be portrayed as competing *legal* values.

The specious law-versus-morality characterization is used most frequently to privilege client loyalty. For example, in the hypothetical discussed above involving a personal injury negotiation in which the plaintiff's lawyer underestimated the value of the claim because of a mistake about the law, the defense counsel's client loyalty option is often seen as the "legal" one and the disclosure option as a "moral" alternative.⁶⁸ In fact, of course, concern for the plaintiff is strongly grounded in the belief that without disclosure the plaintiff will be deprived of a substantive legal entitlement to recover for negligently inflicted losses. Thus, both options are equally "legal" in the sense that they are grounded in important legal values.

The discretionary approach does not deny that some issues are best understood as involving conflicts between legal and nonlegal moral commitments. In fact, the distinction between legal and nonlegal commitments has some importance in delimiting the sphere of the discretionary approach, since the approach does not address decisionmaking involving nonlegal commitments. There are currently no generally accepted guidelines for making such distinctions, and I am not prepared to offer any here. However, it may be helpful to emphasize that such distinctions depend on important issues of legal theory that all lawyers need to resolve (though not necessarily self-consciously) in formulating their understandings of their role. In particular, such distinctions depend first on the relationship between

⁶⁷ See A. GOLDMAN, *supra* note 1, at 90-155; Wasserstrom, *supra* note 1. Such a characterization seems implicit in the tendency of the *Code* and the *Model Rules* to address many issues concerning a lawyer's responsibilities to nonclients in terms of standardless private norms. See *supra* p. 1088 & nn. 9-10.

⁶⁸ I base my claim that this mischaracterization is common largely on my discussions of this problem with students over several years. Cf. Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?*, 55 CHI. B. REC. 31, 33-34 (1973) (characterizing challenges to the libertarian approach as based on subjective nonlegal values).

institutional competence norms and fundamental substantive norms, and second, on the scope of lawyer discretion within the scheme of institutional competence. Whether it makes sense to view ethical conflict in terms of "law versus morals" or the lawyer's problems as functions of "role differentiation" depends on how these issues are resolved.

We can get some sense of the way in which theories about such issues delimit legal commitments and hence the sphere of the discretionary approach by considering two further cases of the sort conventionally understood in terms of conflict between law and morality.

First, recall the discussion above of financial planning, in which I argued that a lawyer might act more aggressively on behalf of the welfare recipient than on behalf of the hotel manager, largely because the relevant legislative purposes stood more clearly against the contemplated plan in the case of the manager.⁶⁹ Many believe that there are nonlegal reasons to represent welfare recipients more aggressively than hotel managers, and some readers may suspect that such considerations motivated my argument. We can sharpen this issue by stipulating that in the welfare case the legislature has clearly indicated a purpose to preclude the proposed plan. The argument for the legality of the plan is almost (but not quite) frivolous, but because the arrangement might pass unnoticed by the welfare department, it could benefit the client.

Almost all lawyers will give weight to clear legislative expression, and many would regard it as dispositive of their obligations. However, a "natural law lawyer" in the style of, say, Lon Fuller would have to consider whether the decisions of the legislature were so plainly wrong and the values they affronted so fundamental that the lawyer should disregard the decisions. The natural law lawyer cannot divorce "his duty of fidelity to law" from "his responsibility for making law what it ought to be."⁷⁰ Such a lawyer believes that a legal system must meet certain normative preconditions to be entitled to respect and compliance, and perhaps even to be considered a system of law. Thus, legal ideals may require that a person repudiate norms that violate such preconditions even when promulgated by otherwise legally authoritative institutions. Such repudiation is the opposite of lawlessness; it moves the system closer to being worthy of respect as lawful.

⁶⁹ See *supra* pp. 1104-06. The two examples show that the law-versus-morality characterization can privilege responses opposed to client interests, although I think this effect is less typical than the privileging of client loyalty.

⁷⁰ Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 647 (1958) [hereinafter Fuller, *Positivism*]. See generally *id.* at 644-57 (arguing that the law must be internally moral before it may be externally applied). Although Fuller is speaking here of the judge, he has applied related arguments to the lawyer elsewhere. See L. FULLER, *THE LAW IN QUEST OF ITSELF* 94-95 (1940).

A lawyer in the welfare case who accepted this natural law theory of legal order would have to consider whether the norm of minimal subsistence income is so fundamental that it amounts to a precondition of legal legitimacy. Such a lawyer might reason that a core value of legality is the autonomy of the individual and that a person who lacked minimal material subsistence would be so dependent and debilitated that she would be incapable of exercising the autonomy that legality aspires to safeguard.⁷¹ In this way, the lawyer might conclude that this value is fundamental and hence that norms that violate it are not entitled to respect.

Even when a lawyer regards the decisions of authoritative institutions as conclusive, she needs to consider the scope of her own authority within the scheme of legal institutions. In particular, she needs to consider whether the lawyering role allows her nullifying powers of the sort commonly imputed to the roles of prosecutor, jury, and judge,⁷² and — less commonly — private citizen (to the extent that civil disobedience is justified in terms of, rather than in opposition to, legal values).⁷³

Consider another case often thought to present a conflict between legality and private moral commitment. A childless married couple have agreed on terms for an amicable divorce. The relevant state law, which has not been amended for decades, provides for divorce only on grounds of fault, such as adultery or mental cruelty, none of which is applicable to the couple's case. The lawyer must decide whether to counsel the couple to perjure themselves to get a divorce, or to risk encouraging perjury by telling them what the legally favorable circumstances would be before inviting them to describe their own. Or perhaps the clients have taken the initiative to commit perjury, and the lawyer discovers it and must decide whether to report it to the court.⁷⁴

In some respects, this case is an appealing one for nullification. It has some of the features on which Guido Calabresi based his defense of judicial nullification of statutes: it involves an apparently obsolescent statute that has become of tune with majority sentiment and the surrounding legal culture, that could not be enacted today, and that survives because of legislative inertia.⁷⁵

Calabresi's argument raises the question of why lawyer nullification is necessary in addition to judicial nullification. Why not have the

⁷¹ Fuller would not have included minimal material subsistence among the prerequisites of a valid legal order, see Fuller, *Positivism*, *supra* note 70, at 642-43 (arguing that only formal procedural concerns are fundamental), but others have, see, e.g., Michelman, *supra* note 55.

⁷² See, e.g., G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); M. KADISH & S. KADISH, *supra* note 24, at 45-66, 80-85.

⁷³ See R. DWORKIN, *supra* note 21, at 206-22.

⁷⁴ This example is drawn from A. GOLDMAN, cited above in note 1, at 103, 139.

⁷⁵ See G. CALABRESI, *supra* note 72, at 1-3, 91-119.

lawyer bring an action on the true facts urging the court to nullify and grant the divorce? One answer is that judicial nullification is not an option in most states. But even if it were, judges might not nullify because they would be unwilling to take the ensuing political heat from a small but energetic minority that intensely supported the statute. Or perhaps the judges would think the existence of this minority would make nullification illegitimate. It may be, however, that the statute is of large symbolic importance to this group, and that the group has no stake in low visibility enforcement decisions. Thus, while public general judicial nullification would not be feasible, low visibility ad hoc nullification at the enforcement level might be. In this respect, the divorce statute resembles statutes prohibiting fornication or soft drug possession that are routinely nullified by the exercise of prosecutorial discretion, sometimes in anticipation of jury nullification. Such low visibility nullification is unavailable here; juries rarely decide divorce cases, and the law puts the burden of initiative on private parties to file and pursue an action for divorce. But lawyer nullification seems quite practical. Perhaps it ought to be considered justified for the same reasons that justify the more commonly recognized forms of nullification.

Of course, to the extent nullification must occur through explicit lawyer assistance in perjury, most lawyers would find it unacceptable;⁷⁶ at the regulatory level, no court or agency of the bar would

⁷⁶ To the extent lawyer nullification involves direct participation in perjury, it might seem to differ from prosecutor and jury nullification in that the lawyer's conduct violates a legal rule. *But cf.* M. KADISH & S. KADISH, *supra* note 24, at 50-62 (discussing arguments that juror nullification violates the rule that the jury must decide in accordance with the instructions and evidence). Perhaps, however, the perjury statute is qualified by some norm that justifies otherwise criminal conduct that is "necessary to avoid a harm or evil" when the "harm or evil sought to be avoided . . . is greater than that sought to be prevented by the law defining the offense charged." MODEL PENAL CODE § 3.02(1) (1985). This provision is subject to two exceptions, the more pertinent of which applies when "a legislative purpose to exclude the justification claimed . . . plainly appear[s]." *Id.* On its face, the divorce statute indicates such an intention, but if the principle of nullification for obsolescence were accepted, it should not count.

Although professional discourse always condemns direct participation in perjury (though not in uncriminalized forms of lying, *see* White, *supra* note 20, at 927-28), lawyers occasionally accept perjury in practice for reasons similar to those advanced in support of familiar forms of nullification. For example, some years ago I frequently observed respected lawyers commit perjury in the following circumstances. Court rules required that to obtain a default judgment, lawyers had to file a sworn affidavit stating that the defendant who had failed to answer was not away on military service. Lawyers routinely signed such affidavits without any specific knowledge as to whether or not they were true, though the affidavits strongly implied the lawyers had such knowledge. Lawyers lightheartedly and without any sense of wrongdoing occasionally referred to this practice as perjury. If asked to explain the practice, they would have said that the cost of investigating the defendant's military status would be unreasonable in light of the small amounts at stake, the very low probability that the defendant had the protected status, and the ease with which the default could be removed if it turned out that the

justify it.⁷⁷ Still, the nullification analogy suggests even here that some ethical dilemmas conventionally portrayed in terms of a conflict between law and morality have *legal* considerations that favor (as well as oppose) courses of action involving perjury. Although lawyers usually conclude that the balance should be struck against such courses, the fact remains that the conflict arises within the legal culture itself.

When the practical issue involves tacit encouragement of perjury or acquiescence in subsequently discussed client perjury, conventional professional discourse recognizes (and sometimes gives dispositive weight to) only one legal value favoring acquiescence or encouragement — confidentiality. By contrast, I believe that the significance of confidentiality concerns is overstated⁷⁸ and that the critical legal concerns favoring acquiescence and encouragement in the divorce case involve legal merit. In the subsequent discovery case, the conventional discourse vacillates between a rule generally requiring disclosure and a rule generally forbidding it.⁷⁹ When the issue is tacit encouragement, most (but not all) commentary disapproves, but disciplinary regimes leave lawyers a broad range of practical autonomy in such matters.⁸⁰ The discretionary approach suggests that the lawyer's decision in all these situations should weigh all the factors that bear on legal merit, including both those that suggest that the divorce statute is obsolete and unjust and the competing factors that emphasize the presumptive validity of statutes and the presumptive wrongfulness of perjury.⁸¹

affidavit had been mistaken. In effect, the lawyers nullified a rule that they regarded as imposing an unreasonable procedural burden through a practice that at least some of them regarded as ("technically") perjury.

Robert Post suggests that the willingness to violate some norms in order to vindicate more important ones characterizes many favorable portrayals of lawyers in popular culture. See Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379, 381-83 (1987).

⁷⁷ See MODEL CODE, *supra* note 4, DR 1-102(A)(3)-(5); MODEL RULES, *supra* note 4, Rule 3.3(a)(1)-(2). Even an authority accepting the general arguments for nullification would likely conclude that the difficulties of explaining, policing, and adjudicating an explicit exception to the general prohibition against lawyer perjury would be too great to allow the exception.

⁷⁸ See *infra* pp. 1138-40.

⁷⁹ Compare ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (interpreting the *Model Code* to prohibit disclosure of subsequently discovered perjury in all situations in which it is likely to be discovered) with ABA Comm. on Ethics and Professional Responsibility, Formal Op. 287 (1953) (dissenting opinion of Brucker and White) (arguing for a categorical disclosure requirement). *Model Rules* 3.3(a)(2) and (4) apparently mandate disclosure. See A. KAUFMAN, *supra* note 16, at 271-72.

⁸⁰ The best known argument for a lawyer running the risk of encouraging perjury appears in Freedman, cited above in note 58, at 1474-75. But cf. M. FREEDMAN, *supra* note 4, at 70-73 (substantially qualifying his earlier position).

⁸¹ For another possible basis for a nullification practice, consider the law and economics argument that full compliance with some regulatory norms is not an appropriate social goal

The discretionary approach does not require that the issues of the relation of institutional and substantive norms and of the lawyer's range of autonomy within the scheme of institutional competence be resolved in any particular way. But how a lawyer resolves these issues will affect how she draws the distinction between professional and private ethics. In some situations, the lawyer will feel that she has a professional obligation to some legally authoritative norm that conflicts with her private, nonlegal commitments. In other situations, she may feel that her private commitment outweighs the professional one. But she will feel such a conflict only when she is reasonably certain that the legal system fails to acknowledge some value to which she is committed or that the system has conclusively rejected such a value. Only at this point is it appropriate to talk of her problem in terms of the limits of "role morality" or "role differentiation." Until then, the problem remains one of the most appropriate performance of her role within the legal system.

III. THE DISCRETIONARY APPROACH DEFENDED

This Part responds to some of the objections that advocates of the conventional approaches to legal ethics might raise against the discretionary approach: that there are no adequate bases for discretionary lawyer judgments, that discretionary decisions would infringe client rights or usurp legislative prerogative, that ethical discretion would dangerously increase unchecked lawyer power, that discretionary judgments would be ineffectual because clients would evade their influence, that the discretionary approach could not give lawyers adequate guidance and notice of their ethical obligations, that the approach is incompatible with the "adversary system," that it would threaten the ability of "unpopular" clients to secure representation, that it fails to take adequate account of the personal values of trust and loyalty implicated in the lawyer-client relation, that it would subvert the kind of cognitive precommitment to the client's cause a lawyer needs to present the case effectively, and that it ignores the need for and the constraints imposed by a strong commitment to confidentiality.

A. *What Justice?*

In sketching the discretionary approach I repeatedly used terms like "justice," "merits," "fair," and "appropriate" in a way that many

both because the norms, if fully enforced, would be inefficient and because the legislature probably intended less than full enforcement. See, e.g., Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 37-58 (1979) (arguing that, when noncompliance would be profitable because undetected or undersanctioned, it is "surprisingly difficult to construct" a categorical argument for voluntary compliance).

would regard as begging the question. If it were clear what justice and legality meant in any given situation, critics might say, then ethical discretion might make sense. But in fact, in most situations of ethical conflict, it is not clear what these ideals require.⁸² The critics might argue that judgments of legality and justice are subjective and arbitrary, that people usually disagree about them, and that one person's justice is another person's oppression. In these circumstances, the proposal for ethical discretion appears as either an invitation to anarchy or an attempt to impose tacitly some set of ungrounded preferences under the guise of legality and justice.

I do not purport to refute these objections. I claim merely that they are inconsistent with the most basic premises of the understanding of the legal system held by most lawyers, including many of those who make the objections. As most lawyers understand it, our legal system depends on the possibility of grounded judgments about legality and justice. Such judgments are not subjective in the sense that the choice between vanilla and chocolate ice cream is subjective; they are not arbitrary in the sense that the result of flipping a coin is arbitrary. They often *are* controversial, but controversy does not preclude legitimacy.

In the dominant understanding, judgments about legality and justice are grounded in the norms and practices of the surrounding legal culture. These norms and practices are objective and systematic in the sense that they have observable regularity and are mutually meaningful to those who refer to and engage in them. Even when lawyers disagree about such judgments, they usually do not regard them as subjective and arbitrary. One indication of this fact is that they do not articulate or experience their disagreement as an opposing assertion of subjective preference or arbitrary will. Rather, they oppose decisions on the ground that they are *wrong* — wrong in terms of norms and practices that they plausibly believe binding on the decisionmaker. Moreover, they are often willing to accept a particular decision as legitimate, even when they regard it as mistaken, in part because they recognize it as a good faith attempt to apply the norms and practices of the culture.

Although many hold this view of legal judgment, it seems deviant in the legal ethics context because the view is usually elaborated in connection with roles other than that of the private lawyer. Lawyers sometimes attribute the capacity for grounded discretionary judgment to juries, prosecutors, police officers, and administrators. The one role for which this capacity is almost always conceded is that of the judge. The judge's capacity for this kind of judgment has been con-

⁸² See, e.g., Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER* 123, 132 (D. Luban ed. 1983); Krash, *supra* note 68.

sidered so fundamental to the legal system that to deny it has been equated with nihilism.⁸³

Although there are many competing theories of judicial decision, most prominent ones converge in repudiating precisely the categorical style of judgment that characterizes the established approaches to legal ethics. We can get some sense of this general view by recalling the role that the case of *Riggs v. Palmer*⁸⁴ has played for several influential legal theorists, including Cardozo, Hart and Sacks, and Dworkin.⁸⁵

The issue in *Riggs* was whether a bequest could pass under a procedurally valid will to a designated legatee who had murdered the testator. The court found that the relevant statutes "if literally construed . . . give this property to the murderer,"⁸⁶ but the majority rejected this construction. The dissenting judges, who did adopt it, took a categorical approach. They reasoned deductively from the premise that statutes must be enforced to the conclusion that the gift must pass. Along the way, they framed the matter narrowly in terms of a single norm, the wills statute, and only the circumstances surrounding the execution of the will. They interpreted the statute formally — without regard to its purposes — and they portrayed their conclusion as logically compelled.

Contemporary jurisprudence has condemned this reasoning and embraced the reasoning of the majority. The majority's approach is discretionary, not categorical. It frames the matter in a way that emphasizes the beneficiary's conduct as well as the testator's, and that implicates not one norm, but two — one that legitimates testamentary disposition and another that holds that a person should not profit from his wrong. The majority interpreted these norms as expressions of social purposes and resolved their conflict by asking which is more fundamental. "One path was followed, another closed, because of the conviction in the judicial mind that the one selected led to justice."⁸⁷

The style of legal reasoning employed in the prevailing approaches to legal ethics is that of the dissent in *Riggs*, not that of the majority. Both of the prevalent approaches resemble the *Riggs* dissent in their refusal to confront tension and their insistence on categorical treatment. The libertarian approach in particular resembles the dissent in its insistence on narrow framing and formal rather than purposive reasoning.

The dominant approaches to legal ethics thus rely on a style of reasoning that is widely regarded as discredited in the jurisprudence

⁸³ See Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740-41 (1982).

⁸⁴ 115 N.Y. 506, 22 N.E. 188 (1889).

⁸⁵ See B. CARDOZO, *supra* note 22, at 40-44; R. DWORKIN, *supra* note 21, at 23-45; H. HART & A. SACKS, *supra* note 22, at 89-93.

⁸⁶ *Riggs*, 115 N.Y. at 509, 22 N.E. at 189.

⁸⁷ B. CARDOZO, *supra* note 22, at 41.

of the judicial role. When we look at the matter from this perspective, judgment about justice and legal merit should seem more plausible than it usually does in the professional responsibility context.

Once it is conceded that judges have the capacity for meaningful discretionary judgment, is it plausible to deny that lawyers have it? Perhaps it might be argued that because judges are selected from the meritocratic elite of the bar, they have greater capacity for judgment than do ordinary lawyers. Whatever one thinks of judicial selection procedures, this argument does not work. Any plausible conception of lawyering requires that ordinary lawyers be able to simulate the decisionmaking methods of officials. Lawyers would not be able to persuade officials or advise clients on how officials apply rules without an understanding of the way officials think. Thus, for example, John W. Davis declared as the "cardinal rule" of advocacy, "Change places (in your imagination of course) with the Court."⁸⁸

Outside the field of professional responsibility, nearly all discussions of the type of thinking required of practitioners speak in terms of complex, informal judgment, not of mechanical rule-following. Llewellyn's "situation sense," Brandeis' emphasis on factual mastery and customized relation building, and Hart and Sacks' notion of craft all imply such judgment.⁸⁹ Even the *Code* speaks of legal judgment in this fashion when it is not addressing legal ethics. In justifying the prohibition of unauthorized practice on the ground that lay people lack the requisite capacity for legal judgment, canon 3 states that the "essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client."⁹⁰ A related precept notes the importance of "sensitive variations in the considerations that bear on legal determinations."⁹¹

To say that most lawyers have a serviceable conception of normative judgment is not to say that they share the same conception. Even lawyers who share the general view exemplified by the *Riggs* majority differ widely over such matters as the range of materials that are relevant to decision and the methodology that should be applied to them. But any approach to decisionmaking that recognizes distinctions in relative importance among different legal interests and that recognizes and attempts to confront the tensions between substance and procedure, purpose and form, and broad and narrow framing is adequate for ethical discretion. The fact that lawyers may

⁸⁸ Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 896 (1940).

⁸⁹ See K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 203-08 (1960); J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW-MAKERS* 339-42 (1950) (on Brandeis); H. HART & A. SACKS, *supra* note 22, at 229-32.

⁹⁰ MODEL CODE, *supra* note 4, EC 3-5.

⁹¹ *Id.* EC 3-2.

differ in their philosophies of decisionmaking no more discredits the claim that their decisions about legal merit can be legitimate and meaningful than the fact that judges may differ discredits this claim in the judicial sphere.

B. Denying Client Rights/Usurping Legislative Power

Some people assert that a lawyer decision based on anything but a clear legal prohibition is wrong when it prevents a client from obtaining an otherwise available advantage, because it violates the client's rights. These people usually acknowledge that rights can be in tension with other social norms because legal rules are an imperfect expression of such norms. But they insist that the proper response to such tensions is not to inhibit clients from taking selfish advantage of the rules, but to press the legislature to change the rules.⁹²

The part of the argument that appeals to client rights conflates an opportunity to obtain an advantage from a legal institution with a right. This conflation might be viable for some purposes if "right" were a purely descriptive term, but in that case rights would have no weight in ethical decisionmaking. To invoke the client's right in a normative sense — to hold that clients have an ethical claim to anything that the courts can be made to yield — presupposes a view of the legal system that few lawyers take seriously any more outside the sphere of professional responsibility.

This is not the place for a full-scale critique of that view,⁹³ but we can see a couple of its more salient defects by considering the case of pleading the statute of frauds to defeat a contract claim the client admits is substantively valid. One problem is that any jurisprudence that would require the lawyer to plead the statute of frauds in such circumstances is internally unstable. It would have to be both positivist, in order to insist that the legally dispositive consideration is that the court would grant a dismissal, and libertarian, in order to insist that the client has an ethical claim to the dismissal without regard to the harm to the plaintiff. But the positivist and libertarian elements seem to undermine each other. The positivist elements invite

⁹² See *id.* EC 8-2; Pepper, *supra* note 4 (elaborating a rights-based defense of the libertarian approach).

⁹³ This view, most prominently exemplified by the classical legal thought of the turn of the century, is an amalgam of positivism and libertarianism. For critiques of positivism, see, for example, R. DWORKIN, cited above in note 21, at 14-45, and L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940). For critiques of libertarianism, see, for example, Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933), and Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975. For critiques of these doctrines as they surface in professional responsibility discourse, see Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER*, cited above in note 82, at 83, 97-100, and Simon, cited above in note 1, at 39-61, 74-101.

us to question why the court's anticipated action is more legitimate than any other exercise of power, including the lawyer's power to force her own views on the client. At the same time, the libertarian elements suggest that there is something wrong with a practice that frustrates a kind of claim — for benefits promised under a contract — that libertarianism generally supports.

Another problem with this jurisprudence is that it neither respects nor provides reasons for rejecting the powerful moral intuition that most people, lay or lawyer, experience in this case: that the plaintiff's claim involves a right strongly grounded in law. This is not necessarily an intuition that the plaintiff should win, but rather that the bare notion of right cannot provide a basis for the lawyer's decision, since there are rights on both sides. In such situations, to insist that the lawyer secure the client's advantage because the client has a right begs the question of which of the competing rights is more entitled to vindication.

The second part of the argument, which directs the lawyer's doubts about pleading the statute away from the case at hand toward future appeals to the legislature, sometimes reflects a mistaken conception of "law" similar to the misunderstanding of "right" in the first part of the argument. Here the claim is that precluding the client from obtaining the advantage would be tantamount to making law, and the power to make law is reserved to the legislature. But few contemporary lawyers would buy this argument. If "making law" means enacting statutes, the lawyer does not make law by refusing to plead the statute of frauds. If "making law" means influencing the application of statutes, then it seems clear that lawyers, along with a host of other actors outside the legislature, necessarily and legitimately make law. Since laws are not self-interpreting or self-enforcing, their application to specific cases must be mediated by decisions of a variety of actors.

In the present case, for example, the lawyer who refuses to plead the statute might plausibly think of herself as enforcing the substantive law of contract rather than altering or frustrating the statute of frauds. A statute that precludes judicial enforcement of a claim does not necessarily indicate an intent to preclude a sense of right and obligation with respect to the claim.⁹⁴ Moreover, the statute of frauds appears to contemplate that the defense it creates will not always be invoked when it is available, since the defense is waivable, and the statute is silent on the specific issue of when lawyers should assist

⁹⁴ Few would conclude that the rule providing that conviction for murder requires proof beyond a reasonable doubt means that people are legally privileged to commit murder so long as they do not leave such proof, or that the rules of charitable and family tort immunity mean that charities and family members have no legal duty to act with reasonable care.

clients to invoke it. That issue requires an interpretive judgment by the lawyer. If the lawyer's goal is fidelity to legislative authority, she cannot reasonably ignore the substantive law of contract, which provides for the enforcement of promises like the one in question. Assume that the lawyer plausibly decides that the only purpose of the statute of frauds is to preclude judicial enforcement in factually disputed cases where reliable evidence is unavailable. The concerns underlying the statute, therefore, would not apply to situations such as this one in which there is no factual dispute. It seems quite plausible, then, for the lawyer to conclude that legal merit (in this case, legislative purpose) would be best vindicated by not pleading the statute.

The appeals to client right and to the legislature reflect a failure to absorb the twin lessons of legal realism for legal ethics. The first — and less appreciated — lesson is that ethically-charged legal controversies are fundamentally *distributive* in the sense that they involve conflicting goals of individuals. The critical implication of this point for legal ethics is that the appeal to individual autonomy or right is not a sufficient basis for client loyalty because it begs the question of why the client's autonomy or right should be preferred to that of the person whose autonomy or right is frustrated by the client's activities.

The second lesson is that rules are indeterminate and must be elaborated in the process of application to particular controversies. This means that those who influence the process of enforcement, including lawyers, have a kind of legislative power. They determine the practical meaning of legislative commands. Many have concluded that such power entails public responsibility.⁹⁵ Whether or not one goes this far, the realist argument at least precludes the libertarian from disclaiming responsibility on the ground that it would usurp legislative prerogative. The lawyer cannot escape involvement in law-making.⁹⁶

⁹⁵ Hart and Sacks' attack on the nineteenth-century railroad lawyers who drafted adhesion contracts disclaiming liability for freight loss is a famous version of the argument that lawyers have lawmaking power and that such power entails public responsibility. See H. HART & A. SACKS, *supra* note 22, at 262–63.

⁹⁶ Pepper's defense of the libertarian approach is basically pre-Realist despite its discussion of "The Problem of Legal Realism." See Pepper, *supra* note 4, at 624–28. Pepper's discussion considers only the realist critique of the determinacy of rules but ignores the realist critique of the notion of rights on which his argument depends. Pepper's response to the indeterminacy point is also inadequate on its own terms. Pepper acknowledges that the counterpurposive manipulation of legal rules undermines the moral basis of public life. But he argues that lawyers can counter the anomic tendencies of libertarian advocacy by engaging in "moral dialogue" about private values and by withdrawing when the client insists on a course that offends the lawyer's private values. See *id.* at 630–33. This approach leaves the public problem of anomie at the mercy of the lawyer's private convictions. It provides no basis for public institutional review or even professional criticism of the lawyer's conduct. At the same time, in minimizing ethical constraints on persuasion and withdrawal, Pepper's approach leaves weak clients vul-

C. Lawyers Too Powerful

Some may concede that lawyers have the capacity to make informal normative judgments but deny the legitimacy of their doing so. These critics would object that the discretionary approach enlarges lawyer power in a way that precludes effective checks. For them, the judicial analogy seems inappropriate because judges are subject to various power-legitimizing public controls that do not apply to lawyers. With either a little cynicism about the ostensible public controls on judges or a little naïveté about the bar's admissions and disciplinary procedures, one might argue that controls on lawyers are comparable to those on judges. But the case for ethical discretion does not require such an argument.

The basic objection is that discretion gives lawyers too much power, but the term "power" is rarely explicated in such complaints. What might it mean? Sometimes it seems to mean the capacity to be arbitrary or to impose purely personal goals, and the thrust of the complaint is that discretionary norms enlarge this capacity because they fail to yield clear answers in specific cases. This complaint conflates a norm that requires a more complex judgment with a norm that constrains decision less. But there is no reason to expect a lawyer who makes decisions in good faith to feel less constrained under discretionary norms than under categorical ones. Like a judge applying a norm such as "due process," the lawyer applying a discretionary norm may feel less confident about the answer she reaches, but as long as she is in good faith, she should not feel any more free to be arbitrary or to impose her own views.

Of course, lawyers will not always make decisions in good faith; hence in part the importance of disciplinary enforcement. Another possible meaning of the claim that ethical discretion gives lawyers too much power is that it increases practical immunity from disciplinary enforcement. Here the argument would be that applications of discretionary norms are more likely to be controversial among lawyers generally than comparable applications of categorical norms. If other lawyers are less likely to agree about what discretionary norms require in particular cases than they are about what categorical norms require, then disciplinary enforcement might constrain less under a discretionary regime.

This criticism confuses the ease with which a norm can be applied with the restrictiveness of a norm. A norm that says lawyers can do anything they want except steal from their clients is relatively easy to apply to particular cases, but it is not very restrictive. A norm that says lawyers must act loyally and competently toward clients may be

more difficult to apply, but it is potentially far more restrictive. The great disadvantage of using categorical norms to avoid difficulties of application is that such norms tend to be both overinclusive and underinclusive relative to their purposes. Far more than discretionary norms, they tend to prohibit desirable conduct, permit undesirable conduct, or both.

It is because of such costs that many of the norms in the professional codes and all of those in the common law protecting clients from lawyers and other professionals tend to be discretionary. The most important of these common law norms, of course, is the duty of reasonable care/prohibition of negligence. Common law negligence adjudication involves the application of discretionary norms to professional conduct in precisely the manner proposed here. Indeed the discretionary approach merely extends the style of judgment taken for granted in the realm of common law client protection to the realm of intraprofessional protection of third party and public interests. My impression is that in the former realm the most common complaint is of excessive rather than insufficient restrictiveness. Moreover, those who do find restriction insufficient rarely associate this problem with the discretionary form of the governing norms.

Another meaning of "power" is the capacity to frustrate another person's goals. Thus opponents of the discretionary approach might complain that it increases lawyer power by requiring and legitimating greater intervention in opposition to client goals. We might respond that any such increased power would be justified to the extent that it served legal merit. But there is a more important response: the discretionary approach does not increase lawyer power because any increase in the lawyer's capacity to frustrate client goals is exactly balanced by a reduction in the lawyer's capacity to frustrate goals of third parties and the public. Lawyers serve client goals by using power against others. The discretionary approach puts the lawyer in opposition to clients by reducing her power to injure others for the sake of the client.

Still another meaning of "power" might be the capacity to fulfill one's own private goals. If the discretionary approach required decisions that coincided with the lawyer's private goals more frequently than did other approaches, one might argue that the discretionary approach extended lawyer power. To the extent that lawyers' private goals and ethical duties coincided simply because of their deep commitment to legality and justice, one might argue that any power arising from this fact should not be objectionable. However, it is not at all clear that the discretionary approach would in fact move ethical decisions closer to lawyers' private goals. Casual observation suggests that the private goals of many lawyers run overwhelmingly toward acquiescence in the goals of clients. These lawyers view increased responsibility to third parties and the public not as a form of empow-

erment, but at best as a demanding professional duty and at worst as an oppressive burden.

Furthermore, there are important indirect controls on the lawyer power under the discretionary regime. Two of the more important sources of the lawyer's power are her ability to refuse assistance and her ability to disclose information to third parties. But the lawyer's refusal usually will constrain the client only to the extent that other lawyers go along with her judgment, and disclosure will be harmful only to the extent that others, usually public officials, act on the information.

Finally, one of the basic sources of the lawyer's power — the ability to refuse assistance — is grounded in what most people would consider a fundamental right to control one's labor. To people not imbued with the ideologies of legal professionalism, it is bizarre to find lawyers responding to proposals for higher than minimal ethical standards by asking rhetorically why a lawyer should "arrogate to herself" the power to determine the justice of a client's goals. When the issue is whether the lawyer will lend her efforts to furthering the goals, this arrogation is nothing more than the right and responsibility of any person who aspires to ethical autonomy.⁹⁷

Thus, the claim that a discretionary approach would dangerously enlarge lawyer power is unfounded. Ethical discretion does not give

⁹⁷ Although the discretionary approach is designed to safeguard the lawyer's ethical autonomy, it is principally concerned with those elements of her moral identity bound up with her commitment to the lawyering role and to the values of legal merit. The discretionary approach is not especially concerned with a lawyer's purely private moral commitments, although it does not deny the importance of such commitments.

Thus, for example, the problem of the "last lawyer in town" does not exist for the discretionary approach in the same sense that it does for approaches that focus on private values. Murray Schwartz popularized this phrase in connection with his discussion of the lawyer who refuses to assist a client with a claim or course of action that, though perhaps legally well grounded, is repugnant to the lawyer's private values. Schwartz suggests that the lawyer should be more reluctant to refuse to assist the client when there is no other lawyer available, since her refusal effectively will deprive the client of a legal entitlement. See Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 562-63.

The discretionary approach focuses on the situation in which the lawyer declines assistance on grounds of legal merit. In this situation, there is no reason to think of her refusal as depriving the client of a legal entitlement. The fact that the lawyer is the "last lawyer in town" is not a problem; indeed it is an advantage to the extent that the lawyer's judgment suggests that the goals of the legal system would be better served if the client were unable to pursue her claim or course of action. (At least this is so when the lawyer decides against assistance on grounds of internal merit. When the decision is a matter of relative merit, the legal system is not necessarily better off if the client's goals are not pursued at all, but given resource constraints, the system is better off if the lawyer devotes her energies elsewhere.)

Nevertheless, the discretionary approach must recognize a related problem. If the lawyer is not only the "last lawyer in town" but also the *only* lawyer in town, then her decision involves considerably more responsibility than where other lawyers are available to consider the matter. This is not a reason to take the case regardless of the merits, but it is a reason to take exceptional care in assessing the merits.

lawyers more power than the conventional approaches in any sense that should be regarded as troubling. It leaves the most important checks on lawyer power unimpaired. And the power it does give lawyers is legitimate.

D. Lawyers Not Powerful Enough

Another charge against ethical proposals more ambitious than the "arguably legal" standard is that they fail to take account of the practical pressures lawyers encounter. Clients will insist that lawyers go to the limits of the law for them, and a lawyer who refuses will find herself without any clients, since less high-minded colleagues will take her business away.

There seem to be two concerns here: first, that the ambitiously ethical lawyer will be unable to earn a living, and second, that the effort to raise standards will be ineffectual because clients will simply find other lawyers who will do their bidding. Even if the factual premises of this objection were true, they would hardly determine the lawyer's ethical obligation conclusively. If I were defending a racketeer and she asked me to arrange for the murder of the prosecution's chief witness, no one would consider me justified in going along, even if she were my only client and I were certain she could hire someone else to do it. Still, the concerns about the lawyer's financial interests and about effectuality are legitimate, and there may be less extreme circumstances in which they should be dispositive. Far from being indifferent to them, the discretionary approach is distinctively well equipped to accommodate them.

The discretionary approach treats the lawyer's interest in earning a living as a factor to weigh in decisionmaking. If a lawyer cannot earn a reasonable living without undertaking a particular representation, that fact weighs in favor of undertaking it. This consideration should not support a general lowering of ethical standards, however, because a lawyer who is financially secure should give it no weight.

The fact that the lawyer's refusal will be ineffectual is also a legitimate consideration. It is relevant in two senses. First, if the practice in question is widespread, that is an indication that it may be proper. The open, widespread use of the practice may mean that most lawyers believe it has legal merit. The more openly widespread the practice, the greater the ability of public authorities to assess and police it, and hence the less the need for lawyers to assume such responsibility. Also, if the practice is widely available to people other than the client in question, considerations of horizontal equity may favor making it available to this client as well. Second, an action by the lawyer that would have no significant effect on anyone but herself is less valuable than one that would contribute practically to vindicating relevant legal merits.

Nevertheless, such concerns cannot be routinely conclusive. Individual lawyers should be willing to consider that the prevailing practices of the bar may fail to live up to the relevant standards of the legal culture and even that legal standards may be out of step with the broader surrounding culture. The law demands such consideration from other occupations — most famously, tugboat owners⁹⁸ — and there is no reason why it should ask less of lawyers. The lawyer also has an interest in her own moral integrity (and perhaps the legal system has an interest in avoiding what the bar calls “even the appearance of impropriety”) that is at least partly independent of the practical consequences of the lawyer’s actions on others.

Moreover, lawyers in fact have greater influence over clients than the criticism implies. Sometimes, lawyers have influence because their clients are unsophisticated or poor. (A lawyer should be careful not to exercise influence over such clients irresponsibly, but when it is clear that a claim or course of action lacks merit, a client’s vulnerability is no reason to go ahead with it.) Also, some clients consider themselves bound by norms of legal merit and justice and are receptive to advice that it would be improper to pursue courses of action that, although arguably permissible, frustrate important legal ideals.

It is a mistake to think that narrowly economic concerns swamp ethical concerns in the calculations of even selfish people. One important way in which ethical norms acquire clout is through status distinctions. When ethical norms are successful, they confer prestige on those identified with them and degradation on those perceived to violate them. Stepping into a role thus degraded has costs that deter people with better opportunities and abilities from doing so. And association with such a role entails costs that may deter clients. The degradation of a practice in this manner can thus inhibit it both by reducing the number and quality of the people willing to perform it and by stigmatizing clients on whose behalf they do so. For example, there have been some areas of the country in which low risk bribery has been common in connection with transactions such as tax abatements and building inspections. Some segment of the bar has always been willing to facilitate such deals, but the unwillingness of elite practitioners, as well as most others, to facilitate them has probably helped limit the practice. Some assert that pressure from elite law students whom Covington & Burling was trying to recruit prompted the firm’s dissociation from South African Airways.⁹⁹ If that is true, it illustrates that practical pressure can arise from what the discretionary approach indicates is ethically correct analysis.

Of course, such matters are highly speculative. We know very little about the practical limits on ethical decisionmaking, in part

⁹⁸ See *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

⁹⁹ See Morgan, *supra* note 29, at A35, col. 1.

because of the confidential nature of practice and in part because these limits are so rarely tested. However, it seems likely that these limits vary widely among different clients and contexts of practice. This suggests that the discretionary approach is correct to insist that these limits be confronted strategically in each particular case, rather than in some general lowering of ethical standards.

Finally, it should be emphasized that the value of ethical analysis is not confined to situations in which the individual practitioner is able to implement its conclusions. First, when the lawyer feels compelled to undertake a practice with little merit, the discretionary analysis emphasizes the moral costs of doing so. To one who believes that ethical self-consciousness has intrinsic value, this should be important. In addition, the analysis encourages the lawyer to watch for opportunities to expand her autonomy by avoiding this kind of representation. Second, the analysis ought to be of value to lawyers who are not yet committed to particular areas of practice where ethical discretion is especially constrained. If, for example, the conditions of tax practice require practitioners to exploit to the hilt the discrepancies between public purposes and their formal legislative expression,¹⁰⁰ then lawyers who have a choice might want to avoid tax practice. Third, practitioners might be able to achieve collectively what none may achieve individually. Ethical analysis remains relevant at the rulemaking level even when discretion is radically constrained at the individual level.

E. Guidance and Notice

Lawyers sometimes complain that informal professional responsibility norms are too indeterminate to provide adequate guidance to lawyers faced with ethical problems or adequate notice to lawyers faced with regulatory sanctions.¹⁰¹ The complaint raises somewhat distinct concerns when it involves what the *Code* calls "aspirational" reflection as opposed to when it involves compliance with disciplinary rules.

With respect to "aspirational" reflection, "guidance" has two different meanings in these complaints. Sometimes it simply means precepts that are helpful in structuring efforts to think through the issues. I argued above that the discretionary approach does provide this sort of guidance. Sometimes, however, "guidance" means specific instructions designed to make it unnecessary to think through the issues. The discretionary approach is short on this kind of guidance, but it

¹⁰⁰ George Cooper suggests that tax practice is moving toward this point but that it is still subject to the waning influence of a more purposive view. See Cooper, *supra* note 44, at 1577-92.

¹⁰¹ See, e.g., Hazard, *supra* note 11, at 571-74.

is not clear that a plausible ethical doctrine could or should try to provide it. Many widely held views of moral life and professional judgment include as a defining feature the willingness to wrestle with the difficulties of applying general norms to particular circumstances. For centuries much of the attraction and dignity of the professional life has been associated with the challenge of such complex judgments. Were the issues of legal ethics ever reduced to a matter of unreflective rule-following, many would cease to regard them as issues of ethics at all.

When it comes to disciplinary rules, the demand for determinacy is more strongly grounded. Here the argument is that the lawyer is entitled to notice sufficient to enable her to comply before she is subjected to coercive sanctions. In fact, however, the discretionary approach is capable of elaboration in a manner that would be sufficiently determinate to serve as a basis for discipline.

The discretionary approach suggests that disciplinary rules should ideally be expressed as rebuttable presumptions — as instructions to behave a certain way unless circumstances indicate that the values relevant to the rule would not be served by doing so. The rules would be elaborated less by categorical specifications and more by discussions of the general values expressed in the rule and by examples, in the fashion of common law elaboration. Rules of this sort would leave a substantial range of autonomy to those subject to them, but discipline would be appropriate when someone failed to apply the rules in good faith or with minimal competence.

Now I do not believe that lawyers who protest that such a disciplinary regime would be unfair because indeterminate should be heard with much patience. I noted above that officials routinely make decisions in our system under general norms in a discretionary manner. These official decisions entail severe and sometimes disastrous consequences for nonlawyers. A businessperson can suffer major financial loss because a judge decides that she has not acted in "good faith" or in accordance with "usage of trade."¹⁰² A doctor can suffer severe financial and professional loss for violation of a norm that is defined only as "reasonable care." A military officer can have his career destroyed for "conduct unbecoming an officer and a gentleman."¹⁰³ It is remarkable to see a profession consisting of people recruited, socialized, and trained with the preeminent goal of inculcating a capacity for normative judgment insisting that the norms that govern them be spelled out at a level of detail that would obviate such judgment.

¹⁰² See, e.g., U.C.C. § 1-201(9) (1978) (stating that the buyer in ordinary course is one who has bought in good faith); *id.* § 1-205 (outlining course of dealing and usage of trade); *id.* § 1-208 (stating that the option to accelerate at will requires good faith).

¹⁰³ *Parker v. Levy*, 417 U.S. 733, 738 (1974).

Nevertheless, the value of the discretionary approach does not depend on the enactment of a regulatory regime of informal norms. A regulatory authority might conclude that in one or more areas only categorical norms would be practically enforceable. Here the role of the discretionary approach would be mainly to emphasize the moral costs of categorical norms and to encourage that they be used sparingly. Once enacted, however, even a relatively categorical regulatory regime is likely to leave the lawyer some significant range of practical autonomy. The discretionary approach would suggest how decisions should be made within the range of that autonomy.

Moreover, decisions of legal merit, even when not subject to discipline, ought not to be considered private matters. Because of both intellectual controversy and enforcement constraints, disciplinary rules are always an incomplete expression of the profession's norms of legal merit; they should not preempt the full range of professional criticism and review. The "Ethical Considerations" of the *Code*, for example, perform the valuable function of acknowledging that coercively enforced rules are not the only professional norms applicable to practice and suggesting that decisions within the range of autonomy left by the rules are not exempt from criticism. Whether undertaken by formally organized agencies of the bar or by individual lawyers and informal groups, public nondisciplinary review and criticism would be an important part of any attempt to implement the discretionary approach.

F. The Tradition of the "Adversary System"

Another complaint is that the discretionary approach is inconsistent with the traditional commitment of our legal culture to the principles of the "adversary system."¹⁰⁴ The complaint misunderstands both our legal tradition and the discretionary approach. Regardless of what the "adversary system" means, it does not adequately describe the relevant aspects of the American tradition of advocacy. In that tradition, the lawyer has been both an advocate and an "officer of the court" with responsibilities to third parties, the public, and the law. There has never been a consensus about where to draw the line between these two aspects of the lawyer's role, and the two have always been in tension within the professional culture.¹⁰⁵

¹⁰⁴ See, e.g., *Gathering*, *supra* note 17, at 651 (remarks of Monroe Freedman).

¹⁰⁵ Outside the professional culture, our tradition has been one of lay disapproval of many of the characteristics associated with adversarial advocacy. See *The Lawyer and His Clients — Correspondence of Messrs. David Dudley and Dudley Field, of the New York Bar, with Mr. Samuel Bowles, of the Springfield Republican* (1871) [hereinafter *Correspondence*], reprinted in A. KAUFMAN, *supra* note 16, at 424-44; Post, *supra* note 76, at 379-83.

The complaint appears to conflate the adversary system with the "arguably legal" advocacy standard, but even if we focus exclusively on the adversarial elements of our tradition, it is far from clear that the libertarian approach to ethics is central or essential. Comparative law scholars suggest that the core of the adversary system lies more in the notion of party autonomy — the conferral of responsibility for defining issues and presenting evidence on the advocates instead of the officials — rather than in the notion of partisan advocacy.¹⁰⁶ Some would insist that the term denotes a measure of partisanship, but this need not disqualify the discretionary approach, which makes room for a good deal of it.

The distinctive feature of the discretionary approach is not the repudiation of partisan advocacy but the insistence that such advocacy be undertaken in good faith as a reasonable means of vindicating the relevant legal merits. This view seems to be at least as well grounded in American legal tradition as the libertarian one. The libertarian approach has never been unchallenged within the profession, and it appears not to have been widely accepted before the late 19th century.¹⁰⁷ In the late 18th and early 19th centuries, the dominant view emphasized a commitment to public responsibility and complex normative judgment in a manner that resembles the regulatory and discretionary approaches more than the libertarian one. The compilations of ethical precepts by Daniel Hoffman in 1817 and George Sharswood in 1854, which are often regarded as the foundations of contemporary professional discourse, repeatedly prescribe complex judgment under general norms of justice. For example, Hoffman wrote:

In *civil* cases, if I am satisfied from the evidence that the *fact* is against my client, he must excuse me if I do not see as he does, and do not press it: and should the *principle* also be wholly at variance with sound law, it would be dishonourable folly in me to endeavour to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.¹⁰⁸

Sharswood insisted that "[c]ounsel have an undoubted right, and are in duty bound, to refuse to be concerned for a plaintiff in the legal

¹⁰⁶ See, e.g., M. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 3 (1986).

¹⁰⁷ See Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 912 (1980); R. Gordon, *Lawyers as the American Aristocracy* (1985) (unpublished manuscript on file with author).

¹⁰⁸ 2 D. HOFFMAN, *A COURSE OF LEGAL STUDY* 755 (2d ed. 1836) (emphasis in original). Hoffman's approach resembles the regulatory approach in its categorical commitment to substance over procedure. See *id.* at 754 (arguing that unmeritorious defenses may not be raised for settlement leverage and that the statute of limitations and infancy may not be pleaded against a substantively valid claim).

pursuit of a demand, which offends his sense of what is just and right."¹⁰⁹ American legal traditions thus amply support the distinctive features of the discretionary approach.

G. The Unpopular Client

Another frequent objection to enlarging the ethical discretion of lawyers summons up the image of the "unpopular client." The fear is that once lawyers engage in anything more than minimal scrutiny of the merits of client goals and claims, "unpopular" people — dissidents, nonconformists, and outcasts — will be unable to find a lawyer. This situation would thwart law's commitment to treat all evenhandedly and to stand above social prejudice. The argument is often accompanied by references to famous incidents in which lawyers courageously defended victims of red scares, religious persecution, and mob violence.¹¹⁰

We can get a sense of the problems with this argument by considering the lawyering that prompted its most famous articulation — the representation of Jim Fisk and Jay Gould by David Dudley Field in the Erie Railroad control contests of the late 1860's. In an exchange of letters following the contest, the newspaper editor Samuel Bowles criticized Field for helping Fisk and Gould in activities that injured the railroad, its stockholders, and the economy.¹¹¹ Field and his son replied that Field had done no more for Fisk and Gould than "giving them legal opinions and arguing cases for them in court," and that he had a duty to do this so that they would "be judged according to the law of the land" rather than by "popular clamor."¹¹² Field invoked Lord Erskine's defense of Tom Paine, in the face of public vilification, against charges of seditious libel arising from the publication of *The Rights of Man*. Erskine had responded to popular derision by proclaiming, "I will forever, at all hazards, assert the dignity, independence and integrity of the English bar, without which impartial justice . . . can have no existence."¹¹³ Field argued that the same principle applied to his representation of Fisk and Gould.

Whereas the activities that prompted the public clamor against Erskine's client involved the publication of a controversial book, the activities that prompted the public clamor against Field's clients involved the looting of the Erie Railroad and the fraudulent manipulation of its stock. That, at least, is how many informed, disinterested

¹⁰⁹ G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 39 (2d ed. 1860).

¹¹⁰ Cf. MODEL CODE, *supra* note 4, EC 2-27 (arguing that the "lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse").

¹¹¹ See *Correspondence*, *supra* note 105, at 424-44.

¹¹² *Id.* at 429, 431.

¹¹³ *Id.* at 430.

observers have viewed it.¹¹⁴ Field, however, might have viewed it differently because some of the claims he asserted on behalf of Fisk and Gould were upheld in the New York Supreme Court and the contest was resolved substantially in favor of his clients by an act of the New York legislature.

However, the judiciary that sustained the claims was highly politicized, partly corrupt, and organized in a way that made it incapable of resolving the matter effectively, and many members of the legislature had been bribed by Gould. Field does not appear to have been involved in the bribery of the legislators, but he was a general in the notorious war of injunctions in the lower courts. Field's clients and their adversary, Commodore Vanderbilt, would each in turn apply to a friendly judge, who would promptly enter *ex parte* the requested order vacating prior orders entered by other judges at the behest of the opposing party and enjoining the opposing party in accordance with the wishes of the applicant.¹¹⁵ The state code of civil procedure drafted by Field facilitated this chaos by effectively giving trial judges in different districts statewide venue and jurisdiction without providing an adequate method of resolving conflicting decrees.

From the point of view of the discretionary approach, this was a striking case of the kind of procedural failure that triggers responsibility to assess substantive merit. It was not plausible to think that the court, given its staffing and organization, was reliably equipped to resolve the matter justly. Thus, Field was wrong to think he had no duty to assess the substantive merits of his clients' claims. Those who have made such an assessment have tended to conclude that the claims had no merit at all.¹¹⁶

The relevance of this analysis to the "unpopular client" argument is to illustrate that whether one should be concerned about a client's unpopularity depends on what the source of the unpopularity is. If unpopularity reflects a valid assessment of the legal merits of the client's claims and goals, there should be no concern at all. Of course, the lawyer ought not to accept unquestioningly lay public judgments of legal merits, but when her own judgment agrees with the public's, the client's unpopularity is no reason to assist him. Of the many distinctions between Erskine's situation and his own that Field ignored was that the claims of Erskine's client had considerably more legal merit. They were strongly grounded in legal norms of free speech.

¹¹⁴ See, e.g., C. ADAMS & H. ADAMS, *CHAPTERS OF ERIE AND OTHER ESSAYS* 1-99, 135-91 (1886); M. KLEIN, *THE LIFE AND LEGEND OF JAY GOULD* 81-98 (1986).

¹¹⁵ Field was alleged to have offered \$5000 to a political crony of a judge then favoring the Vanderbilt camp to persuade the judge to modify an injunction that he had refused in open court to modify. The charge was never resolved. See C. ADAMS & H. ADAMS, *supra* note 114, at 36-37.

¹¹⁶ See *id.*; *Correspondence*, *supra* note 105, at 431-33, 440-44.

The other classic examples of civil representation of unpopular clients, such as those involving civil rights demonstrators or victims of red scares, are also compelling because the claims of the clients had strong merit, often grounded in the first amendment. Under the discretionary approach, this merit provides a compelling reason for a lawyer to take the case.

Moreover, in practice, libertarian ethics seem to have made little contribution to the bar's willingness to represent "unpopular clients" in civil liberties cases. The typical "unpopular client" in the civil liberties area is unable to pay the costs of representation and thus depends on the willingness of lawyers to take such cases pro bono. Yet, in pro bono cases, lawyers have always made judgments of legal merit. Survey evidence indicates that lawyers tend to be considerably more committed to substantive civil liberties values than the lay public is.¹¹⁷ This commitment, I submit, and not the bar's commitment to libertarian ethics, accounts for its admirable service to unpopular clients with meritorious civil liberties claims. It is the bar's traditional, albeit inconsistent, commitment to civil liberties that deserves veneration and elaboration.

H. Personal Values

Legal ethics are usually defended in terms of legal norms, but especially in recent years, they have occasionally been defended in terms of extralegal personal values. Some such arguments suggest that the attorney-client relation defined by the libertarian approach is an intrinsically valuable expression of personal trust and loyalty that should be fostered and protected.¹¹⁸ Raising the lawyer's responsibility to values and people outside the relation would undermine these personal values.

One problem with this argument is that it ignores some salient aspects of lawyering. Much lawyering is done for impersonal organizations. To be sure, lawyers have personal relations with individual representatives of these organizations, but they owe their professional duties not to these individuals, but to the impersonal organizational entity or to large numbers of beneficiaries, shareholders, or members with whom they have no personal relation at all.¹¹⁹ Lawyering that is done directly for individuals often can be done efficiently only on a high volume basis that provides little opportunity for developing a

¹¹⁷ See J. HEINZ & E. LAUMANN, CHICAGO LAWYERS 145-46, 149-51 (1982); H. McCLOSKEY & A. BRILL, DIMENSIONS OF TOLERANCE 245-47 (1983).

¹¹⁸ See, e.g., Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066 (1976).

¹¹⁹ See MODEL CODE, *supra* note 4, EC 5-18 (duty owed to "entity"); MODEL RULES, *supra* note 4, Rule 1.13 (duty owed to "organization").

personal relation with clients. Moreover, the personal perspective ignores the commercial dimension of most practice. In substantial part, lawyers are in it for the money, and the bar explicitly authorizes them to betray their clients in many situations in which their financial interests are at stake.¹²⁰

Second, the personal approach requires us to define the value of lawyering without reference to law, or to put it differently, to demand a kind of deference that law gives to virtually no other personal relations. Law is the least personal mode of social order. People resort to law to the extent more personal modes of order fail or when they fear these modes will fail. With few exceptions, the law requires that personal relations yield to its purposes.¹²¹ Moreover, many of the most compelling issues of legal ethics arise from situations in which loyalty to the client requires the lawyer to contribute to an injury to some other personal relation in which the client is involved. From a personal perspective, it is not clear why the lawyer-client relation should be preferred to the relations it damages.

Finally, another feature of the lawyer-client relation envisioned by the traditional adversary view suggests that it should not be highly valued, even in strictly personal terms. This is the absence of reciprocity in loyalty. The lawyer is supposed to be loyal to the client's goals, but the client has no duty of loyalty to the lawyer's goals, even those that are integral to her conception of justice. This means that the relation may require the sacrifice of some of the lawyer's most basic commitments. Lawyers such as Daniel Hoffman and George Sharswood viewed this aspect of the libertarian approach as intolerably degrading.

Any acceptable conception of the lawyering role should afford opportunities for satisfying personal relations between lawyers and clients. What the discretionary approach suggests is that these satisfactions should be grounded in a shared commitment to norms of legality and justice or, at least, in a coincidence of the client's goals with such norms.

I. Cognitive Dissonance

I argued above that the discretionary approach could accommodate a high degree of aggression in advocacy, subject to the qualification

¹²⁰ See, e.g., MODEL CODE, *supra* note 4, DR 4-101(c) (allowing a lawyer to breach confidences when necessary to collect a fee); *id.* DR 2-110(C)(1)(f) (allowing a lawyer to withdraw if her client deliberately fails to pay the fee); MODEL RULES, *supra* note 4, Rule 1.6 (allowing a lawyer to breach confidences to establish a claim in a controversy between herself and the client); *id.* Rule 1.16(b)(4) (allowing a lawyer to withdraw if her client, after reasonable warning, fails to fulfill an obligation to the lawyer regarding the lawyer's services); *id.* Rule 1.16(b)(5) (allowing a lawyer to withdraw if the representation will cause an unreasonable financial burden on the lawyer).

¹²¹ For example, the legal system stands ready to compel the testimony of parent against child, sibling against sibling, and friend against friend.

that aggressive advocacy must be part of a good faith effort to vindicate legal merit. One contemporary justification for libertarian ethics challenges this precept by suggesting that any direct integration into the lawyering role of responsibility for the merits will impair the lawyer's ability to represent clients in a way that best contributes to appropriate resolutions.¹²²

The argument is based on a theory of cognitive dissonance — the tendency of preconceptions to validate themselves by obscuring inconsistent data. It asserts that adjudication is most reliable when the judge decides the case after a proceeding in which each side develops as effectively as possible the arguments and evidence favorable to its claims. The lawyer contributes best to such a proceeding by developing her presentation with a strong psychological commitment to her client's claims. Responsibilities to third parties, the public, or norms of merit would interfere with such a commitment. They would require her to entertain hypotheses about the ultimate merits of the client's claims early in the proceeding, potentially blinding her to considerations favorable to her client that she might otherwise have perceived.¹²³

Even if this theory were correct, it would not be fatal to the discretionary approach. If adopting a strong presumption in favor of the client's claims is the best way for the lawyer to contribute to an effective adversary presentation, and if an effective adversary presentation is the best way for the lawyer to contribute to the appropriate resolution of the matters in issue, then under the discretionary approach the lawyer should adopt such a strong presumption. Even if correct, however, the cognitive dissonance theory would not warrant such a presumption in situations where the matter was not likely to be resolved by adversary proceedings. Nor would it warrant the presumption in adversary proceedings in which, because of some anomaly or breakdown — for example, radically unequal access to evidence or judicial bias — the general theory did not hold.

The theory is troubling to the discretionary approach, however, because if correct and accepted, it would narrow the practical distance between the libertarian and the discretionary approaches. When lawyers did apply the strong presumption, they would find themselves more readily justifying aggressive tactics on the ground of legal merit than they would be able to under a more balanced or dispassionate view. It is thus worth emphasizing some of the reasons why the cognitive dissonance theory seems wrong.

¹²² See, e.g., Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 35, 43-45 (Berman ed. 1972).

¹²³ To the extent that the cognitive dissonance argument is offered in support of the libertarian approach, it involves a partial non sequitur. Even if the most reliable procedure would have each lawyer adopt a strong bias in favor of her client, that would not warrant the lawyer's pressing the client's claim when she concluded, despite her bias, that the claim ought not to prevail.

First, the proponents of this theory have never been able to formulate an adequate account of it. Their theory has rested on the notion that opposing biases somehow neutralize each other, rather than simply creating confusion. But they have never explained why this is so.

Second, in other areas, ranging from business planning to scientific investigation, where making an accurate decision among a variety of contested positions is important, decisionmakers rarely adopt the method of adversary presentation by biased advocates.¹²⁴ The most common approach is to have the participants approach the question with an open mind and in good faith, rather than have them commit themselves arbitrarily to a position and try to make the most of it. The rejection of the adversary approach in other contexts suggests that its perpetuation in the legal sphere has more to do with individualist or antistatist political ideologies or the reluctance of lawyers to oppose clients than with its superiority as a mode of accurate decisionmaking.

Third, the theory probably does not even accurately depict the methodology of partisan advocates in adversary proceedings. As I noted above, a plausible theory of advocacy has to acknowledge the importance of entering into the judge's perspective as well as the client's. The advice of successful advocates often turns the cognitive dissonance theory on its head. They caution that a strong presumption in favor of the client may blind the advocate to opposing considerations that will be important to the judge, leaving the lawyer unprepared to meet these concerns at trial.¹²⁵ New lawyers often adopt the cognitive dissonance theory instinctively, sometimes with disastrous consequences, when they find that they have focused so intently on developing their own cases that they have failed to think through, and thus have nothing to say in response to, opposing counsels' points.

J. Confidentiality

Some defenders of the libertarian approach assert that it is supported by the policies and values underlying the evidentiary privilege

¹²⁴ See Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 843-47 (1985); Luban, *supra* note 93, at 93-96.

¹²⁵ See, e.g., R. KEETON, *supra* note 20, at 6-8; see also C. WOLFRAM, *MODERN LEGAL ETHICS* 2 (1986) (suggesting that, other than rule knowledge, the central characteristic of the legal role is "detachment" from the perspective of the client). This point relates to the argument that, regardless of whether pro-client intellectual biases are desirable in theory, they will become pervasive in practice under a discretionary regime because clients will seek out lawyers predisposed in favor of their goals. In fact, clients pay a cost for such loyalty, since a lawyer with strong pro-client biases loses some capacity to anticipate the reaction of third parties and the government to the client's activities. Thus, some suggest that the dominant incentives would favor lawyers with independent perspectives, even if such lawyers have a greater sense of public responsibility. See Berle, Book Review, 76 HARV. L. REV. 430, 431-32 (1962); H. HART & A. SACKS, *supra* note 22, at 262-63.

and broader professional obligation of confidentiality.¹²⁶ In contrast to the arguments based on the putatively personal value of the lawyer-client relation discussed above, these defenses invoke values of procedural fairness and accurate decisionmaking. Although the discretionary approach is compatible with a broad range of positions on confidentiality, it has greater affinity for relatively limited and flexible ones.¹²⁷ Thus it is worth noting some of the reasons to doubt the claims made for more far-reaching and categorical confidentiality obligations.

One of the arguments for broad confidentiality is that any greater-than-minimal obligation to disclose adverse information will encourage lawyers to rely on opposing counsel to give them information, thus creating a disincentive for lawyers to develop their own cases fully. Yet if we assume that lawyers would exchange relevant information routinely under a discretionary ethical regime, it is hard to see this argument as an objection. The legal system has no interest in encouraging duplicative efforts at discovering information or in unnecessarily increasing the difficulty of discovering it. On the other hand, if we assume that lawyers will not routinely disclose relevant information (because they will violate discretionary disclosure norms or find exceptions to them), then there would continue to be ample incentive for each lawyer to prepare thoroughly.

Sometimes the argument for nondisclosure is put in fairness terms. The claim is that the clients have a proprietary interest in information developed by their lawyers, which would be violated by forced disclosure to the other side. This is quite a different claim from the first one because the right it asserts, if recognized, would compete against the legal interest in accurate decisionmaking. There is, however, no basis for such a right sufficient to trump this legal interest. The legal system rarely recognizes such claims with respect to information in the hands of third parties. It is not sufficient to say that the client is paying for the lawyer's services and therefore has a proprietary interest

¹²⁶ See, e.g., M. FREEDMAN, *supra* note 4, at 1-8.

¹²⁷ See, e.g., Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1172-81 (1985) (advocating mandatory disclosure "to prevent serious harm"). In line with their categorical proclivities, defenders of strict confidentiality like to compare the sweeping privilege they favor with a regime of no privilege at all. See, e.g., Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 606-11 (1980). Obviously, however, there are plausible intermediate points. For example, the confidentiality obligation might be qualified by a duty to disclose when necessary to avoid substantial injustice, or as Harry Subin proposes, when necessary "to prevent serious harm," Subin, *supra*, at 1173, or when a third party had a substantial need for the information and could not obtain it elsewhere; cf. FED. R. CIV. P. 26(b)(3) (exception to attorney work product privilege); *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (qualifying a corporation's attorney-client privilege in shareholders' derivative action), *cert. denied*, 401 U.S. 974 (1971).

Before the 20th century, the English and American bars operated under much narrower and more ambiguous confidentiality safeguards than they do now. See Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1069-91 (1978).

in the information she develops. What the client can expect to get for her money depends on what the rules are and on how much of her discretion the lawyer puts up for sale. If the rules require disclosure, or if the lawyer is committed to it and makes her position clear to the client, the client cannot expect confidentiality by virtue of her payment. Perhaps a client has some limited claim to information that has been especially expensive to develop. But such a claim could be satisfied best by requiring a party seeking disclosure to pay some reasonable portion of that expense.¹²⁸

Another — and perhaps the best known — argument for strict confidentiality appeals to values of accurate decisionmaking and focuses on the client's incentives to disclose relevant information to the lawyer. The argument is that if the client knows that the lawyer might turn over adverse information to the other side, she will withhold information from the lawyer and thus compromise the lawyer's ability to represent her.¹²⁹ As a normative matter, the argument's priorities seem perverse. The argument shows greater solicitude for the withholding client than for the opposing party who will be harmed by nondisclosure, even though the only thing we know about the client is that she is irresponsible, and we know nothing about the opposing party.

Also, the argument's empirical premises are unverifiable and not powerful intuitively. People would have ample incentives to disclose adverse information to counsel even without confidentiality safeguards because they are honest and law-abiding, because they cannot make reliable judgments about when it is in their interests to withhold, or because in many business contexts they risk liability by failing to seek good legal advice. The absence of an evidentiary privilege does not appear drastically to inhibit disclosure to other professional advisers, even to accountants, whose work overlaps that of lawyers. More dramatically, even sophisticated people often volunteer self-inculpa-

¹²⁸ Cf. FED. R. CIV. P. 26(b)(4)(C) (providing for discovery of opposing party's trial preparation materials subject to, *inter alia*, duty to pay portion of expenses incurred in developing them). In some circumstances, there may be practical difficulties in protecting the discloser's interest in compensation. But, usually, the interest in a just disposition of the case, which favors disclosure, will outweigh the compensation interest.

¹²⁹ See, e.g., M. FREEDMAN, *supra* note 4, at 1-8. A variation on this argument, made by the drafters of the *Model Rules*, is that the possibility of disclosure would inhibit clients from mentioning harmful intentions in situations in which, if they had been mentioned, the lawyer would have been able to dissuade the client from pursuing them. See MODEL RULES, *supra* note 4, Rule 1.6, comment 9. The argument is not very impressive: although the lawyer may gain a few opportunities to try to dissuade her client because of the unqualified confidentiality rule, she loses the leverage of threatened disclosure which gives her the best chance of succeeding. Even the drafters did not take their own argument seriously. Their argument would apply only to contemplated future harm, and it would apply most strongly to contemplated acts involving the most serious harm. Yet the drafters excepted precisely such acts from the otherwise strong confidentiality safeguard of Rule 1.6. See *id.* Rule 1.6(b)(1).

tory information to the police after *Miranda* warnings, apparently from a natural compulsion to vindicate themselves.¹³⁰

Reduced confidentiality would probably entail some costs to clients, but the important issue is whether these costs outweigh the costs to third parties and the legal system from the prohibition of disclosure.¹³¹ I suspect that few nonlawyers find the balance struck by the prevailing rules plausible, and even lawyers sometimes strike the balance differently when they confront analogous issues involving other professionals. Quoting a famous California case holding psychiatrists liable for failing to disclose patients' violent intentions, Deborah Rhode notes, "[w]hen self-interest is not at issue, many professionals, including lawyers, have concluded that 'the uncertain and conjectural character' of threats to client confidence should not take precedence over concrete risks to innocent third party victims."¹³²

K. Lawyer Motivations and Values

One could accept the arguments of this essay and still believe that the world is better off to the extent that lawyers act as unreflective rule-followers rather than as exercisers of discretionary judgment. Perhaps lawyers are so motivated by material self-interest that they would not make discretionary judgments about legal merit in good faith. Or perhaps lawyers' substantive values and their insight into legal merit and justice are so deficient that, although discretionary judgment might be theoretically possible, it would lead to poor decisions in practice. Such possibilities, if true, would support the claim that legal ethics should confine and regulate decisionmaking as rigidly as possible through categorical rules.

Such arguments, however, require trust and confidence in the people who make the rules. Under most current regimes, that means lawyers. Still, the argument might be attractive to someone who had more confidence in the elite of the bar, who exercise the rulemaking power, than in the rank-and-file. Or one might believe that collective rulemaking decisions by lawyers are more reliable than individual ethical decisions, perhaps because the former are made in terms of general norms in which the decisionmaker has a less personal stake,

¹³⁰ See, e.g., Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters in New Haven*, 77 YALE L.J. 300 (1967).

¹³¹ Although this rhetoric might strike some as excessively utilitarian, an analogous issue would arise under a "rights-based" perspective, since such an approach would have to consider the effect of confidentiality on the rights of third parties as well as those of the client.

¹³² Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 616 (1985) (quoting *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 439, 551 P.2d 334, 346, 131 Cal. Rptr. 14, 26 (1976)). The *Model Rules* and the *Code* permit but, unlike *Tarasoff*, do not require disclosure to protect third parties from serious physical harm. See MODEL CODE, *supra* note 4, DR 4-101(C)(3); MODEL RULES, *supra* note 4, Rule 1.6(b)(1).

because they are made in high visibility settings, or because they are subject to public controls. Thus, one could believe coherently that lawyers can be trusted at the rulemaking level but not at the level of individual decision, and that rules ought therefore to constrain individual decisionmaking rigidly.

This Article has little to say in response to such claims. Like most discussions of lawyering, mine simply takes for granted that lawyers are substantially motivated to act ethically and that they have a capacity for reasonably good normative judgment. These premises are not obviously correct, and they deserve critical investigation, although they have yet to receive much.¹³³

Although the premises remain to be established, they are not arbitrary. They arise from the most basic of the traditional ambitions of lawyers — the ideal of direct participation by the individual lawyer, independent of both client and state, in the elaboration and implementation of legality and justice. The most serious criticism of the libertarian and regulatory approaches is that they alienate the lawyer from legality and justice. They do so by requiring her to do things that violate her best judgment of how to vindicate legal merit and justice (or would violate such a judgment if she were not discouraged from making one), and by excessively subordinating the lawyer to the client, in the case of the libertarian approach, and to the state, in the case of the regulatory one. The discretionary approach is an attempt to redeem the traditional ideal from the corruptions of a series of jurisprudential mistakes.

The plausibility of the discretionary approach thus depends on the plausibility of the traditional ideal. No doubt, one can easily find instances of betrayal of the ideal to material self-interest or simply to a moral and intellectual sloth averse to conflict and challenge. Nonetheless, many lawyers still regard the ideal as one of the attractions of the professional life and experience disappointment to the extent that it remains unfulfilled. The vindication of this ideal surely depends on changes in the organization and economics of practice.¹³⁴ Correcting the jurisprudential mistakes of the categorical approaches is not a substitute for such changes, but like them, it is a prerequisite to the redemption of the professional ideal.

IV. CONCLUSION

The fundamental defect of the prevailing approaches to legal ethics lies in their premise that the legal enforceability or permissibility of a

¹³³ One important exception is Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985). See also Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 571-76 (1985) (commenting on Nelson).

¹³⁴ See Gordon, *supra* note 3; Rhode, *supra* note 132, at 626-38.

client's claim or course of action is an ethically sufficient reason for assisting the client. The premise is mistaken for two reasons. First, it ignores considerations of relative merit. It thus legitimates assisting client goals that meet the threshold test of minimal merit, but that have little merit relative to other goals the lawyer might assist. Second, it fails to confront adequately the tensions between substance and procedure, purpose and form, and broad and narrow framing. The premise that potential enforceability alone justifies assistance inappropriately relieves the lawyer of responsibility to assess the quality of the relevant enforcement processes and to consider how she might contribute most effectively in the particular case to improving their capacity to vindicate legal merit. The premise that legal permissibility alone justifies assistance ignores important legal values competing with those that favor client autonomy and ignores that decisions may be legally permissible and yet not best vindicate relevant legal merits. By forcing the lawyer to confront more directly the norms of legal merit in the particular case, the discretionary approach seeks to overcome these limitations.